IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
PLAINTIFF IN ERROR,
vs.
CHARLES HABER ET AL.
No. 268.

In Error to the Supreme Court of the State of Kansas.

For convenient reference we set out here the laws of Congress and the statutes of Kansas bearing on the questions involved in this case, and referred to in our statement and argument. For statement see p. 29.

CHAP. 60. An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of Agriculture shall organize in his department a Bureau of Animal Industry, and shall appoint a chief thereof, who shall be a competent veterinary surgeon, and whose duty it shall be to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also inquire into and report the causes of contagious, infectious, and communicable diseases among them, and the means for the prevention and cure of the same, and to collect such information on these subjects as shall be valuable to the agricultural and commercial interests of the country; and the Commissioner of Agriculture is hereby authorized to employ a force sufficient for this purpose, not to exceed twenty persons at any one time. The salary of the chief of said Bureau shall be three thousand dollars per annum; and the commissioner shall appoint a clerk for said Bureau, with a salary of one thousand five hundred dollars per annum.

SEC. 2. That the Commissioner of Agriculture is authorized to appoint two competent agents, who shall be practical stock-raisers or experienced business men familiar with questions pertaining to commercial transactions in live stock, whose duty it shall be, under the instructions of the Commissioner of Agriculture, to examine and report upon the best methods of treating, transporting, and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to provide against the spread of other dangerous contagious, infectious, and

communicable diseases. The compensation of said agents shall be at the rate of ten dollars per diem, with all necessary expenses, while engaged in the actual performance of their duties under this act, when absent from their usual place of business or residence as such agent.

Sec. 3. That it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each State and Territory, and invite said authorities to co-operate in the execution and enforcement of this act. Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State or Territory in which pleuro-pneumonia or other contagious, infectious, or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the Governor of a State or other properly constituted authorities signify their readiness to co-operate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions of this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another.

Sec. 4. That in order to promote the exportation of live stock from the United States the Commissioner of Agriculture shall make special investigation as to the existence of pleuro-pneumonia, or any contagious, infectious, or communicable disease, along the dividing lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock are

exported, and make report of the results of such investigation to the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigations may require.

Sec. 5. That to prevent the exportation from any port of the United States to any port in a foreign country of live stock affected with any contagious, infectious, or communicable disease, and especially pleuro-pneumonia, the Secretary of the Treasury be, and he is hereby, authorized to take such steps and adopt such measures, not inconsistent with the provisions of this act, as he may deem necessary.

Sec. 6. That no railroad company within the United States, or the owners or masters of any steam or sailing or other vessel or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious or communicable disease; nor shall any person, company or corporation drive on foot or transport in private conveyance from one State or territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia: *Provided*, That the so-called splentic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of sections four, five, six and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.

Sec. 7. That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat, or other transportation company doing business in or through any infected locality, and by publication in such newspapers as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section six of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Sec. 8. That whenever any contagious, infectious, or communicable disease affecting domestic animals, and especially the disease known as pleuro-pneumonia, shall be brought into or shall break out in the District of Columbia, it shall be the duty of the commissioners of said District to take measures to suppress the same promptly and to prevent the same from spreading; and for this purpose the said commissioners are hereby empowered to order and require that any premises, farm, or farms where such disease exists, or has existed, be put in quarantine; to order all or any animals coming into the District to be detained at any place or places for the purpose of inspection and examination; to prescribe regulations for and to require the destruction of animals affected with contagious, infectious, or communicable disease, and for the proper disposition of their hides and carcasses; to prescribe regulations for disinfection, and such other regulations as they may deem necessary to prevent infection or contagion being communicated, and shall report to the Commissioner of Agriculture whatever they may do in pursuance of the provisions of this section.

Sec. 9. That it shall be the duty of the several United States district attorneys to prosecute all viola-

tions of this act which shall be brought to their notice or knowledge by any person making the complaint under oath; and the same shall be heard before any district or circuit court of the United States or Territorial court holden within the district in which the violation of this act has been committed.

Sec. 10. That the sum of one hundred and fifty thousand dollars, to be immediately available, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the treasury not otherwise appropriated, to carry into effect the provisions of this act.

Sec. 11. That the Commissioner of Agriculture shall report annually to Congress, at the commencement of each session, a list of the names of all persons employed, an itemized statement of all expenditures under this act, and full particulars of the means adopted and carried into effect for the suppression of contagious, infectious, or communicable diseases among domestic animals.

Approved May 29, 1884.

Extract from Appropriation Act of Congress approved March 3, 1891: —

For carrying out the provisions of the act of May 29th, 1884, establishing the Bureau of Animal Industry and the Act of August 30th, 1890, providing for an inspection of meats and animals, five hundred thousand ($500,000) dollars, and the Secretary of Agriculture is hereby authorized to use any part of this sum he may deem necessary or expedient and in such manner as he may think best to prevent the spread of pleuro-pneumonia and other diseases of animals and for this purpose to employ as many persons as he may deem necessary and to expend any part of this sum in the purchase and destruction of diseased or exposed animals and the quarantine of the same whenever in his judgment it is essential to prevent the spread of

pleuro-pneumonia or other diseases of animals from one State into another.

CHAP. CXXIV. An act to facilitate commercial, postal and military communication among the several States.

Whereas the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post roads, and to raise and support armies: Therefore: —

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination: *Provided*, That this act shall not affect any stipulation between the government of the United States and any railroad company for transportrtion or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road or connection with any other road without authority from the State in which said railroad or connection may be proposed.

Sec. 2. And be it further enacted, that Congress may at any time alter, amend, or repeal this act.

Approved June 15, 1866.

The above is Section 5258 of the Revised Statutes of 1878.

(6754) Diseased cattle. Sec. 60. That no person or persons shall drive or cause to be driven into or through any county in this State any cattle diseased with a disease known as Texas, splenic or Spanish fever. Any person violating any provision of this act shall on conviction be adjudged guilty of a misdemeanor, and shall be fined not less than one hundred and not more than one thousand dollars, and be imprisoned in the county jail not less than thirty days and not more than one year. (Laws 1881, ch. 161, Sec. 1, March 12.)

(6755) Held until judgment rendered. Sec. 61. That upon the arrest of any person or persons charged with the violation of any of the provisions of this act, all cattle found in his or their possession shall, during the arrest and trial of the offenders, be stopped and taken charge of by the officer or person executing the warrant of arrest, to abide the judgment of the court before whom the offender or offenders shall be tried. (Laws 1881, ch. 161, Sec. 2, March 12.)

(6756) Duty of sheriff. Sec. 62. That upon a complaint made to any sheriff within the State, by any citizen thereof, that there are, within the county where said sheriff resides, wild or undomesticated cattle infected or diseased with what is commonly known as Texas, splenic or Spanish fever, said sheriff shall forthwith take charge of said cattle and corral the same, or otherwise prevent their running at large, until said complaint shall be investigated as hereinafter provided. (Laws 1881, ch. 161, Sec. 3, March 12.)

(6757) Appoint inspectors. Sec. 63. It shall be the duty of such sheriff, upon taking charge of any cattle as provided in sections two and three of this act, to immediately give notice thereof to any justice of the peace in his county; whereupon said justice shall immediately summon three resident citizens of

the county to forthwith appear before him for the purpose of inspecting such cattle; and when the persons so summoned, or other persons summoned in their stead, shall appear, it shall be the duty of the justice to administer to them an oath, in writing, that they will faithfully discharge their duties as inspectors of the cattle aforesaid, and without delay make report to him of their finding in the premises. (Laws 1881, ch. 161, Sec. 4, March 12.)

(6758) Examine and report; expenses; fees. Sec. 64. Upon taking the oath, as provided in section four of this act, said inspector shall immediately proceed to examine cattle so in the custody of the sheriff, and if upon such examination they shall find the condition of the same to be such as to endanger the health of other cattle in the vicinity by reason of probable contagion, they shall immediately report their findings to the justice aforesaid in writing, and thereupon the justice shall forthwith issue to the sheriff his order in writing, commanding him to keep such cattle in his custody and under his control until the first day of November next ensuing; and he may employ such assistance as may be required to properly care for such cattle, keeping a correct and itemized account of all such services and the cost thereof, as well as of all feed necessary to be used, and present a report thereof to the commissioners of the county at their next regular session, and if found by them to be correct and reasonable, they shall allow the same, and draw warrants upon the county treasury therefor; and the sheriff shall be allowed for his services such compensation as the commissioners shall deem reasonable, taking as a basis for their estimate the fees allowed by law for similar services; and the inspectors shall be allowed in like manner for their services not to exceed two dollars per day, for time actually spent in making the inspection, and ten cents per mile for every mile necessarily traveled in the discharge of their duties. (Laws 1881, ch. 161, Sec. 5, March 12.)

(6759) Evidence. Sec. 65. That, in the trial of

any person or persons charged with the violation of any of the provisions of this act, proof that the cattle, of which such person or persons are charged with driving are wild and of undomesticated habits, shall be taken as *prima facie* evidence that said cattle are diseased with the disease known as Texas, spenic or Spanish fever. (Laws 1881, ch. 161, Sec. 6, March 12.)

(6760) Damages. Sec. 66. Any person or persons who shall drive or cause to be driven into or through any county in this State any of the cattle mentioned in section one of this act, in voilation of this act, shall be liable to the party injured for all damages that may arise from the communication of disease from the cattle so driven, to be recovered in civil action; and the party so injured shall have a lien upon the cattle so driven. (Laws 1881, ch. 161, Sec. 7, March 12.)

(6761) Jurisdiction. Sec. 67. Justices of the peace, within their respective counties, shall have criminal jurisdiction in all cases arising under the provisions of this act. (Laws 1881, ch. 161, Sec. 8, March 12.)

(6762) County attorney. Sec. 68. It shall be the duty of the prosecuting attorney of the proper county to prosecute on behalf of the State all criminal cases arising under this act. (Laws 1881, ch. 161, Sec. 9, March 12.)

(6763) Deliver cattle to owner provided. Sec. 69. Whenever any cattle are taken by the sheriff or other officer under the provisions of this act, and shall remain in his possession, he shall, on the first day of November thereafter, deliver the same to their owner or owners, or his or their agent or agents: *Provided*, That before he shall deliver the same, all costs and expenses which have accrued by reason of the taking and detaining of such cattle as hereinbefore provided are paid into the county treasury; and in case such costs and expenses are not so paid within ten days after said first day of November, the sheriff shall advertise in the same manner as is by law provided in cases of sales of personal property that he will sell such cattle, or such portion thereof as may be necessary to pay such costs and expenses; and at the time

and place so advertised he shall proceed to sell as many of said cattle as shall be necessary to pay such costs and expenses, and out of the proceeds of such sale he shall pay such amount into the county treasury, retaining the costs of sale. (Laws 1881, ch. 161, Sec. 10, March 12.)

(6764) Construction. Sec. 70. Nothing in this act shall be construed to conflict with the provisions of section one, chapter one hundred and seventy-six, laws of 1879, or acts amendatory thereof. (Laws 1881, ch. 161, Sec. 11, March 12.)

(6769) Not driven when. Sec. 75. That no cattle from that portion of the State of Texas which lies south of the thirty-fourth degree of latitude shall be driven into the tract of country bounded as follows: Commencing at the northwest corner of Finney County, thence south on the west line of range thirty-six to the south line of the State; thence east along said south line, to the range line between ranges twenty-six and twenty-seven; thence north along said range line to the south line of township twenty-eight; thence west to the east line of Finney County; thence north along said east line to the north line of said county of Finney; thence west on said north line to the place of beginning, between the months of April and November in each year, under the penalties of this act and the act of which this is amendatory. (Laws 1883, ch. 145, Sec. 2, March 13.)

Section 6771. No person or persons shall, between the first day of February and the first day of December of any year, drive or cause to be driven into or through any county or part thereof in this State, or turn upon or cause to be turned or kept upon any highway, range, common or pasture within this State, any cattle capable of communicating or liable to impart what is known as Texas, splenic, or Spanish fever. Any person violating any provisions of this act shall upon conviction thereof be adjudged guilty of a misdemeanor, and shall for each offense be fined not less than five hundred dollars nor more than two thousand dollars, or be imprisoned in the county jail not

less than thirty days and not more than one year, or by both such fine and imprisonment. (Laws 1885, ch. 191, sec. 1, as amended by Laws of 1891, ch. 201, Sec. 1.)*

(6772) Duty of sheriff. Sec. 78. It shall be the duty of any sheriff, under sheriff, deputy sheriff or constable within this State, upon a complaint made to him by any citizen of the State, or otherwise having notice or knowledge that there are within the county where such officer resides, cattle believed to be capable of communicating or liable to impart the disease known as Texas, splenic, or Spanish fever, to forthwith take charge of and restrain such cattle under such temporary quarantine regulations as will prevent the communication of such disease, and make immediate report thereof to the live-stock sanitary commission, and such officer shall keep said cattle in custody as aforesaid until released by order of said live-stock sanitary commission, and no officer who shall take or detain any cattle under the provisions of this act shall be liable to the owner or owners of such cattle for any damages by reason of such taking or detention, or by reason of the performances of any other duty enjoined in this act. (Laws 1885, ch. 191, Sec. 2, March 12.)

Section 6773. Whenever the live-stock sanitary commission shall determine that certain cattle within the State are capable of communicating or liable of imparting Texas, splenic or Spanish fever, they shall issue their order to the sheriff or any constable of the county in which said cattle are found, commanding him to take and keep such cattle in his custody, subject to such quarantine regulations as they may pre-

* (6767.) Exempted territory. Sec. 73. That all of that portion of territory situated in Labette County, included within the following boundaries, to wit: Commencing at a point where the Neosho river crosses the south line of the State of Kansas; thence north along said river to a point where the section line between sections twenty-six and thirty-five, in township thirty-four, range twenty-one east, crosses said river; thence directly west on the section line to the half-section corner of sections twenty-eight and thirty-three in said township and range; thence directly south along the half-section lines to the southern boundary of the State of Kansas, be and the same is hereby exempted and excluded from the operations of all the provisions of an act entitled An act for the protection of stock from disease, approved February 26, 1867, and all the amendments thereto thereafter made. (Laws 1873, ch. 139, Sec. 1, March 27.)

scribe, until the first day of December next ensuing, on which date they shall direct such officer to deliver said cattle to their owner or owners, or his or their agents. Before any cattle so held shall be delivered as aforesaid, there shall be paid to said live-stock sanitary commission all the costs and expenses of taking, de taining and holding said cattle; and in case such costs and expenses are not so paid on the said first day of December, the said officer shall advertise in the same manner as is by law provided in cases of sales of personal property on execution, that he will sell such cattle, or such portions thereof as may be necessary to pay such costs and expenses, besides the expenses of such sale. And at the time and place so advertised he shall proceed to sell as many of said cattle as may be necessary to pay off such costs and expenses and the expenses of sale, and shall forthwith pay over to the live-stock sanitary commission any amount so received in excess of the legal fees and expenses of such officer. And any officer performing any of the duties enjoined in this section, or in the next preceding section of this act, shall receive the same compensation therefor as is prescribed by law for similar services; and in case such fees cannot be collected by the sale of such stock, they shall be paid by the county in which such cattle were held. (Laws 1885, ch. 191, sec. 3, as amended by Laws 1891, ch. 201, sec. 2.)

Section 6774. Any person or persons who shall drive, ship, or transport, or cause to be shipped, driven, or transported, into or through any county in this State, any cattle liable or capable of communicating Texas, splenic or Spanish fever, to any domestic cattle of this State, shall be liable to any person or persons injured thereby for all damages that they may sustain by reason of the communication of said disease, or Texas, splenic, or Spanish fever, to be recovered in a civil action in any court of competent jurisdiction, and the parties so injured shall have a first and prior lien to all other liens for such damages on the cattle communicating the disease of Texas, splenic or Spanish fever. (Laws of 1885, ch. 191, sec. 4, as amended by Laws 1891, ch. 201, sec. 3.)

Section 6775. In the trial of any person charged with the violation of any provisions of this act, and in the trial of any civil action brought to recover damages for the communication of Texas, splenic or Spanish fever, proof that the cattle which such person or persons are charged with shipping, driving, or keeping, or which are claimed to have communicated the said diseases, were brought into this State from south of the thirty-seventh parallel of north latitude, shall be taken as *prima facie* evidence that such cattle were, between the first day of February and the first day of December of the year in which the offense was committed, capable of communicating and liable to impart Texas, splenic or Spanish fever, within the meaning of this act, and that the owner or owners or person or persons in charge of such cattle had full knowledge and notice thereof. If the owner or owners or person or persons in charge of said cattle, shall show by such certificate or certificates, as shall hereafter be designated by the live stock sanitary commission of the State, that the said cattle had been kept since the first day of December of the previous year west of the twenty-second meridian of longitude west from Washington, and north of the thirty-fourth parallel of north latitude, the provisions of this section shall not apply thereto. (Laws 1885, ch. 191, sec. 5, as amended by Laws 1891, ch. 201, sec. 4.)

(6776) Jointly and severally liable. Sec. 82. Whenever two or more persons shall in violation of this act, at the same time or at different times during the same year, drive or cause to be driven upon the same highway, range, common or pasture within this State, any cattle capable of communicating, or liable to impart Texas, splenic or Spanish fever, they shall be jointly and severally liable for all damages that may arise from the communication of such disease at any time thereafter during the same year to any native, domestic or acclimated cattle that shall have been upon the same highway, range, common or pasture so previously traveled over by such first mentioned cattle. (Laws 1885, ch. 191, Sec. 6, March 12.)

(6777) Jurisdiction. Sec. 83. Justices of the peace within their respective counties shall have criminal jurisdiction in all cases arising under the provisions of this act. (Laws 1885, ch. 191, Sec. 7, March 12.)

(6778) County attorney. Sec. 84. It shall be the duty of the prosecuting attorney of the proper county to prosecute on behalf of the State all criminal cases arising under this act. (Laws 1885, ch. 191, Sec. 8, March 12.)

(6825) Texas fever. Sec. 131. The live-stock sanitary commission shall have power to create and enforce quarantine against the disease known as Texas, splenic or Spanish fever in any of the unorganized counties of the State. In so doing it shall have the power and as far as possible follow the terms of law and requirements of the law creating the commission. (Laws 1884, ch. 4, Sec. 1, March 26.)

(6826) Co-operation. Sec. 132. That the live-stock sanitary commission be authorized and directed to co-operate with the Commissioner of Agriculture of the United States, or any officer or authority of the general government, in the suppression and extirpation of any and all contagious diseases among domestic animals, and in the enforcement and execution of any and all acts of Congress to prevent the importation or exportation of diseased cattle, and the spread of infectious or contagious disease among domestic animals. (Laws 1884, ch. 5, Sec. 1, March 26.)

ARTICLE 11 — STATE VETERINARIAN — SANITARY COMMISSION.

Sec. 104. Appointment of State veterinarian.
105. Oath and bond of.
106. Duties of.
107. Study and investigate diseases of animals.
108. Sanitary commissioners.
109. Duties of.
110. Meetings; may establish quarantine.
111. Kill and destroy infected animals.

Sec. 112. Appraisement of animals.
113. Quarantine established; notice.
114. Assistants; supplies.
115. Railroads; duties of.
116. Pay for animals.
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118. Duty of sheriff.
119. Bringing animal into State.
120. Examination of.
121. Misdemeanors under act.
122. Certificates for animal.
123. Construction of act.
124. Compensation of commission.
125. Governor declare quarantine.
126. Owners of stock yards.
127. Duty of sheriff and other officers.
128. Penalty.
129. Act not to apply.
130. Commission administer oath.
131. Texas fever; quarantine.
132. Co-operation.
133. Tax levy to create fund.

AN ACT to provide for the appointment of a State veterinary surgeon, to prescribe his duties and fixing his compensation.

Be it enacted by the legislature of the State of Kansas:—

(6798) State veterinarian. Sec. 104. The Governor, by and with the advice and consent of the Senate, shall, immediately upon the passage of this act, appoint a competent and skilled veterinary surgeon for the State, who at the date of such appointment shall be a graduate in good standing of a recognized college of veterinary surgery, and who shall hold his office until his successor is appointed and qualified. The Governor shall also, at the regular session of the Legislature in eighteen hundred and eighty-seven, and every two years thereafter, and during a regular session of the legislature, by and with the advice and consent of the Senate, appoint a competent and skilled

veterinary surgeon for the State, having the qualifications above mentioned, whose term of office shall be fortwoyears from the first day of April next succeeding his appointment, unless sooner removed, as hereinafter provided. The veterinary surgeon for the State shall keep his office at the capital of the State, in a room to be provided by the executive council, and shall receive a salary of twenty-five hundred dollars per annum, payable as the salaries of State officers are paid, and actual necessary traveling expenses by him incurred and paid, in the discharge of his duties, to be drawn from the treasury upon itemized accounts thereof properly verified, rendered monthly, and approved by the Governor. The Governor shall have power of removal, and shall immediately fill all vacancies which may at any time occur in the office of State Veterinarian. (Laws 1884, ch. 1, Sec. 1, March 25.)

(6799) Oath and bond. Sec. 105. Before entering upon the duties of his office, the State veterinarian shall take and subscribe an oath to faithfully discharge the duties of his said office, and shall execute a bond to the State of Kansas, in the sum of five thousand dollars, with good and sufficient sureties, conditioned for the faithful performance of the duties of his office; which bond and sureties thereto shall be approved by the Governor, and said bond, together with his oath of office, shall be deposited in the office of Secretary of State. (Laws 1884, ch. 1, Sec. 2, March 25.)

(6800) Duty of. Sec. 106. It shall be the duty of the State veterinarian, under direction of the live-stock sanitary commission for the State, to investigate any and all cases of contagious or infectious diseases among domestic animals of the State, which may come to his knowledge or be brought to the notice of the live-stock sanitary commission, and for this purpose shall visit at once any locality within the State where any such contagious or infectious disease of domestic animals may be reported to exist, and make a full and careful examination of all animals supposed to be diseased, and inquire into the nature and cause

of any such disease which he may discover; prescribe the proper care, necessary remedies, and direct the sanitary measures necessary to prevent the spread thereof; and to make a full report of his findings and doings in the premises, to the live-stock sanitary commission, with recommendations and suggestions as to the means necessary to be employed to prevent the spread, and best calculated to exterminate any and all such contagious or infectious diseases, by him found to exist among the domestic animals of the State. (Laws 1884, ch. 1, Sec. 3, March 25.)

(6801) Study and investigate diseases of animals. Sec. 107. The State veterinarian shall make a continuous and scientific study and investigation of all diseases of domestic animals, and the causes, preventives and cures thereof, and report the result of his study and investigation to the Secretary of the State Board of Agriculture, giving in plain, ordinary language, the symptoms by which any such disease may be identified; how liable to be introduced and spread; the causes and conditions to which may be attributed the production of any such disease, and the sanitary and other measures best calculated to prevent the germination and spread of any such contagious or infectious disease among live stock, together with the best known treatment and remedies, also the treatment necessary in case of injury to domestic animals, in time for publication in the several reports required by law of the said State Board of Agriculture; and perform such other service and duties as may be required by law or directed by the live-stock sanitary commission in the interest of the State. (Laws 1884, ch. 1, Sec. 4, March 25.)

An Act for the protection of domestic animals.

Be it enacted by the legislature of the State of Kansas:—

(6802) Commissioners. Sec. 108. Three commissioners, to be appointed by the Governor, by and with

the advice and consent of the Senate, shall constitute the live-stock sanitary commission of the State of Kansas. Before entering upon the duties of his office, each commissioner shall take and subscribe to oath of office, and file the same with the Secretary of State, and each commissioner, before entering on the performance of his duties, shall execute a bond, to be approved by the executive council, in the sum of two thousand dollars, conditioned that he will faithfully perform the duties of his office, and file the same with the Secretary of State. The term of office of said commissioners shall be for the period of one, two and three years respectively, from the first day of April next succeeding their appointment, and the Governor shall have power to fill any vacancy in said commission. Said commissioners shall elect one of their number chairman, and the State veterinarian shall be *ex-officio* secretary of said commission. The secretary shall keep a full record of the proceedings of the commission, and make such report to the Governor as may from time to time be required, who may transmit the same to the Secretary of the State Board of Agriculture for publication. (Laws 1884, ch. 2, Sec. 1, March 25.)

(6803) Duty of. Sec. 109. It shall be the duty of the commission provided for in the first section of this act, to protect the health of the domestic animals of the State from all contagious or infectious diseases of a malignant character, and for this purpose it is hereby authorized and empowered to establish, maintain and enforce such quarantine, sanitary and other regulations as it may deem necessary. It shall be the duty of any member of said commission, upon receipt by him of reliable information of the existence, among the domestic animals of the State, of any malignant disease, to at once notify the State veterinarian, who shall go at once to the place where any such disease is alleged to exist, and make a careful examination of the animals believed to be affected with any such disease, and ascertain, in possible, what, if any, disease exists among the live stock reported to be af-

fected, and whether the same is contagious or infectious, or not; and if said disease is found to be of a malignant, contagious or infectious character, he shall direct the temporary quarantine and sanitary regulations necessary to prevent the spread of any such disease, and report his findings and actions to the commission. (Laws 1884, ch. 2, Sec. 2, March 25.)

(6804.) Meeting; establish quarantine. Sec. 110. Upon the receipt by any member of this commission of the report of the State veterinarian, provided for in section 2 of this act, if said member shall be of the opinion that the exigencies of the case require he shall immediately convene the commission at such place as he may designate, and if, upon consideration of the report of the veterinarian, the commission shall be satisfied that any contagious or infectious disease exists of a malignant character, which seriously threatens the health of domestic animals, they shall proceed at once to the infected district, ascertain and determine the premises or grounds infected, and establish the quarantine, sanitary and police regulations necessary to circumscribe and exterminate such disease; also to list and describe the domestic animals affected with such disease, and those which have been exposed thereto, and included within the infected district or premises so defined and quarantined, with such reasonable certainty as would lead to their indentification; and for that purpose the said commission may, in its discretion, cause the live stock so included within the quarantined lines established to be marked or branded in such manner as the commissioner may designate. And no domestic animal liable to become infected with the disease, or capable of communicating the same, shall be permitted to enter or leave the district, premises or grounds so quarantined, except by authority of the commission. The said commission shall also from time to time give and enforce such directions, and prescribe such rules and regulations, as to separating, mode of handling, treating, feeding and caring for such diseased and exposed animals as it shall deem necessary to prevent the two classes of

animals from coming in contact with each other, and perfectly isolate them from all other domestic animals which have not been exposed thereto, and which are susceptible of becoming infected with the disease. And the said commission, or any of the members thereof, and said veterinarian, are hereby authorized and empowered to enter upon any grounds or premises to carry out the provisions of this act. (Laws 1884, ch. 2, Sec. 3, March 25.)

(6805) Kill and destroy animals. Sec. 111. When in the opinion of the commission it shall be necessary, to prevent the further spread of any contagious or infectious disease among the live stock of the State, to destroy animals affected with or which have been exposed to any such disease, it shall determine what animals shall be killed, and appraise the same as hereinafter provided, and cause the same to be killed, and the carcasses disposed of as in its judgment will best protect the health of the domestic animals of the locality. (Laws 1884, ch. 2, Sec. 4, March 25.)

(6806) Appraisement. Sec. 112. Whenever, as in the fourth section of this act provided, the commission shall direct the killing of any domestic animal or animals, it shall be the duty of the commissioners to appraise the animal or animals to be killed, and shall make an inventory of the animal or animals condemned, and in fixing the value thereof the commissioners shall be governed by the value of said animal or animals at the date of appraisement: *Provided*, That no animal or animals shall be appraised except those affected with contagious pleuro-pneumonia of cattle, or foot-and-mouth disease, or such as have been exposed thereto. (Law 1884, ch. 2, Sec. 5, March 25.)

(6807) Quarantine established; notice. Sec. 113. When the commission shall have determined the quarantine and other regulations necessary to prevent the spread among domestic animals of any malignant, contagious or infectious disease found to exist among the live stock of the State, and given its order as herein-

before provided, prescribing quarantine and other regulations, it shall notify the Governor thereof, who shall issue his proclamation, proclaiming the boundary of such quarantine, and the orders, rules and regulations prescribed by the commission, which proclamation may be published by written or printed handbills posted within the boundaries or on the lines of the district, premises, places or grounds quarantined, or by being published in the official State paper: *Provided*, That if the commission decide that it is not necessary, by reason of the limited extent of the district in which such disease exists, that a proclamation should be issued, then none shall be issued; but such commission shall give such notice as may to it seem best to make the quarantine established by it effective. (Laws 1884, ch. 2, Sec. 6, March 25).

(6808) Assistants; supplies. Sec. 114. The commission provided for in this act shall have power to employ at the expense of the State such persons, and purchase such supplies and material, as may be necessary to carry into full effect all orders by it given, as hereinbefore provided. *Provided*, That no labor shall be employed nor material or supplies purchased by the commission except such additional labor, material and supplies as may be necessary to carry into effect the quarantine and other regulations prescribed by the commission. (Laws 1884, ch. 2, Sec. 7, March 25.)

(6809) Railroads; duty. Sec. 115. It shall be the duty of the railway corporations doing business in this State to cleanse and disinfect the cars used by them in transporting stock in this State, at such times and places as the commission may designate, whenever in the opinion of the commission any such order may be necessary to prevent the spread of infectious or contagious diseases. Any such corporation violating any of the provisions of this section shall be liable to a penalty of five hundred dollars for each offense, to be recovered in a civil action to be prosecuted under the direction of the attorney general, in the name of the State of Kansas. (Laws 1884, ch. 2, Sec. 8, March 25.)

(6810) Pay for animals. Sec. 116. When any animal or animals are killed under the provisions of this act by order of the commission, the owner thereof shall be paid therefor the appraised value as fixed by the appraisement hereinbefore provided for. *Provided*, The right of indemnity on account of animals killed by order of the commission under the provisions of this act, shall not extend to the owner of animals which have been brought into the State in a diseased condition, or from a State, country, territory, or district, in which the disease with which the animal is infected, or to which it has been exposed, exists. Nor shall any animal be paid for by the State which may be brought into the State in violation of any law or quarantine regulation thereof, or the owner of which shall have violated any of the provisions of this act, or disregarded any rule, regulation or order of the live-stock sanitary commission, or any member thereof. Nor shall any animal be paid for by the State which came into the possession of the claimant with the claimant's knowledge that such animal was diseased or was suspected of being diseased, or of having been exposed to any contagious or infectious disease. Nor shall any animal belonging to the United States be paid for by the State. (Laws 1884, ch. 2, Sec. 9, March 25.)

(6811) Report disease. Sec. 117. It shall be the duty of any owner or person in charge of any domestic animal or animals who discovers, suspects or has reason to believe that any of his domestic animals, or domestic animals in his charge, are affected with any contagious or infectious disease, to immediately report such fact, belief or suspicion to the commission, or any member thereof, and to the sheriff and county clerk of the county in which such domestic animal is found; and it shall be the duty of any person who discovers the existence of any contagious or infectious disease among the domestic animals of another, to report the same at once to the sheriff and county clerk of the county in which such domestic animal is found. (Laws 1884, ch. 2, Sec. 10, March 25.)

(6812) Duty of sheriff. Sec. 118. The sheriff to whom the existence of any infectious or contagious disease of domestic animals is reported, shall forthwith proceed to the place where such domestic animal is and examine the same, and forthwith report the result of such examination to the commission, or any member thereof, and shall prescribe such temporary quarantine regulations as will prevent the spread of the contagion or infection until the live stock sanitary commission can provide and order suitable quarantine rules and regulations. (Laws 1884, ch. 2, Sec. 11, March 25.)

(6813) Bringing into State. Sec. 119. Any person who shall knowingly bring into this State any domestic animal which is affected with any contagious or infectious disease, or any animal which has been exposed to any contagious or infectious disease, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than five hundred nor more than five thousand dollars. (Laws 1884, ch. 2, Sec. 12, March 25.)

(6814) Examination. Sec. 120. Any person who owns, or is in possession of live stock, which is, or which is suspected or reported to be affected with any infectious or contagious disease, who shall refuse to allow the State veterinarian, or other authorized officer or officers, to examine such stock, or shall hinder, or obstruct the State veterinarian, or other authorized officer or officers, in any examination of, or in an attempt to examine, such stock, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars. (Laws 1884, ch. 2, Sec. 13, March 25.)

(6815) Misdemeanor under act. Sec. 121. Any person who shall have in his possession any domestic animal affected with any contagious or infectious disease, knowing such animal to be so affected, or after having received notice that such animal is so affected, who shall permit such animal to run at large, or who

shall keep such animal where other domestic animals not affected by or previously exposed to such disease may be exposed to its contagion or infection, or who shall sell, ship, drive, trade or give away such diseased animal or animals which may have been exposed to such infection or contagion, or who shall move or drive any domestic animal in violation of any direction, rule, regulation or order establishing and regulating quarantine, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars for each of such diseased or exposed domestic animals which he shall permit to run at large, or keep, or sell, ship, drive, trade, or give away in violation of the provisions of this act: *Provided*, That any owner of any domestic animal which has been affected with or exposed to any contagious or infectious disease may dispose of the same, after having obtained from the State veterinarian a bill of health for such animal. (Laws 1884, ch. 2, Sec. 14, March 25.)

(6816) Certificates for animal. Sec. 122. When any live stock shall be appraised and killed by order of the commission, it shall issue to the owner of the live stock so killed, a certificate, showing the number and kind of animals killed, and the amount to which the holder is entitled, and report the same to the auditor of State. And upon presentation of such certificate to the auditor, he shall draw his warrant on the treasurer for the amount therein stated, payable out of any money appropriated for the payment of such claims. (Laws 1884, ch. 2, Sec. 15, March 25.)

(6817) Construction. Sec. 123. The provisions of this act shall not be construed to include any other than contagious and infectious diseases, nor shall it be construed as to interfere in any manner with the provision of chapter one hundred and forty-four, Session Laws of eighteen hundred and eighty-three. (Laws 1884, ch. 2, Sec. 16, March 25.)

(6818) Compensation. Sec. 124. The members

of the commission, appointed by the Governor as hereinbefore provided, shall receive five dollars per day for the time by them necessarily employed in the discharge of the duties required by this act. And each member of the commission hereinbefore provided for shall receive the actual necessary traveling expenses by him incurred and paid in the discharge of the duties required of him by the provisions of this act, which said per diem and expenses shall be drawn from the treasury on the warrant of the auditor, to be issued on the filing in his office of an itemized account thereof, properly verified. (Laws 1884, ch. 2, Sec. 17, March 25.)

(6819) Declare quarantine, when. Sec. 125. Whenever the Governor of the State shall have good reason to believe that any dangerous, contagious or infectious disease has become epizootic in certain localities in other States, Territories, or countries, or that there are conditions which render such domestic animals from such infected districts liable to convey such disease, he shall, by proclamation, prohibit the importation of any live stock of the kind diseased into the State, unless accompanied by a certificate of health, given by a duly authorized veterinary inspector; and all such animals arriving in this State shall be examined without delay by the State veterinary surgeon, and, if deemed necessary, placed in close quarantine until all danger of infection is passed, when they shall be released by the order of the veterinary surgeon or the live stock commission. (Laws 1884, ch. 2, Sec. 18, March 25.)

(5820) Owners of stock yards. Sec. 126. That the owners of any stock yards doing business in this State, when requested by the live-stock sanitary commission, shall appoint and keep constantly in their employ at their expense, a competent inspector of live stock, whose duty it shall be to daily inspect with care, all animals brought into the stock yards in whose employ any such inspector may be; and upon the discovery, by such inspector, in such yards, of any animal

affected with any malignant, contagious or infectious disease, he shall direct the manner in which any such diseased animal shall be disposed of so as to prevent the spread of any such contagious or infectious disease, and for this purpose may cause any such diseased animals to be killed and the carcasses to be disposed of at the expense of the owner thereof, in such manner as will prevent the spread of any such disease; but in no event shall any such diseased stock be permitted to be driven or shipped out of any such stock yards, except to some rendering establishment, or other suitable place for killing and disposing of such diseased animal as hereinbefore provided for, and then under such regulations and restrictions as may be necessary to prevent the spread of the disease on account of which any such animals have been condemned. *Provided*, That the owner of any animal or animals ordered to be destroyed by any inspector shall have the right to appeal from any decision of such inspector to the State veterinarian of the State live-stock sanitary commission; and during the pendency of such appeal, the condemned animals shall be kept in strict quarantine at the expense of the owner thereof, unless the State veterinarian shall decide such stock is not so diseased, then said expenses shall be paid by the owners of such stock yards: and *provided further*, that no compensation shall be made by the State to owners of diseased live stock found in public stock yards and destroyed as herein provided. The inspector of live stock, in any stock yards in this State, shall, on demand of the owner of any live stock passing through any such stock yards, furnish to said owner a bill of health for any live stock by him inspected as hereinbefore required, and found to be healthy. (Laws 1884, ch. 2, Sec. 19, March 25).

(6821) Officers' duties. Sec. 127. The commissioners shall have the power to call upon any sheriff, under sheriff, deputy sheriff or constable to execute their orders, and such officers shall obey the orders of said commissioners, and the officers performing such duties shall receive compensation therefor as is prescribed by law for like

services, to be paid as other expenses of said commission as hereinbefore provided; and any officer may arrest on view, and take before any magistrate of the county, any person found violating the provisions of this act, and such officer shall immediately notify the county attorney of such arrest, and he shall prosecute the person so offending according to law. (Laws 1884, ch. 2, Sec. 20, March 25.)

(6822) Penalty. Sec. 128. Except as otherwise provided in this act, any person who shall violate, disregard, or evade, or attempt to violate, disregard or evade any of the provisions of this act, or who shall violate, disregard, or evade, or attempt to violate, disregard or evade any of the rules, regulations, orders or directions of the live-stock sanitary commission establishing and governing quarantine, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred nor more than five thousand dollars. (Laws 1884, ch. 2, Sec. 21, March 25.)

(6823) Act not apply. Sec. 129. The provisions of this act shall not apply to sheep and hogs, except when affected or exposed to foot-and-mouth disease, or to cattle when affected by the disease known as Spanish or Texas fever. (Laws 1884, ch. 2, Sec. 22, March 25.)

(6824) Oaths. Sec. 130. For the purposes of this act each member of the live-stock sanitary commission is hereby authorized and empowered to administer oaths and affirmations. (Laws 1884, ch. 2, Sec. 23, March 25.)

STATEMENT.

I.

By this proceeding in error, the Missouri, Kansas & Texas Railway Company, plaintiff in error here, and defendant in the courts below, seeks to reverse the judgment of the Supreme Court of Kansas in affirming the judgments of the District Court of Lyon County, Kansas, in favor of the plaintiff and 140 other persons who were joined as defendants in the District Court, and each of whom filed cross-petitions claiming affirmative relief as authorized by the laws of Kansas. The judgments below amounted, in the aggregate, to about $45,178.19.

The pleadings, as disclosed by the record, consisted of the amended petition of the plaintiff Haber (Trans., pp. 7–9) filed December 4th, 1893, and the answer and cross-petitions of the defendants Lantry and Farrington and H. R. Scroggins (Trans., pp. 10–13) and the answer and cross-petitions of the other defendants except the railway company, about 140 in number, and which were exactly like that of Scroggins and Brother, except that different amounts of damages were claimed, and for different cattle (Trans., pp. 14–16) and the amended answer of the Missouri, Kansas & Texas Railway Company to the petition and all of the cross-petitions (Trans., pp. 19-23).

The amended petition of the plaintiff Haber alleged that the defendants Missouri, Kansas & Texas Railway Company, Hosier Brothers (a cattle firm composed of E. A. and George B. Hosier), Francis Brogan, W. J. Brogan and Joseph N. Brogan, between April 1st and July 15th, 1892, transported, drove and brought 2,300 head of Texas cattle

belonging to Hosier Brothers from a point in Texas south of the 37th parallel of the north latitude in the State of Kansas in violation of an act of the legislature of the State of Kansas entitled "An Act for the Protection of Cattle against Contagious Diseases," and known as Chap. 161 of the Laws of 1881 and acts amendatory thereof and supplemental and additional thereto, to Hartford, Kansas, and from Hartford, through the county of Lyon, into the county of Chase, in the State of Kansas, and kept the said cattle upon the same highway, range, common and pasture with the cattle of plaintiff. That the cattle had the disease known as the Texas, splenic or Spanish fever, and were capable of communicating the same to the domestic cattle of Kansas, and before said cattle were shipped, transported and driven and kept said defendants had knowledge, and were put upon dutible inquiry, and had reason to know that said Texas cattle were of a kind capable of communicating, and liable to communicate, such disease to the cattle of the plaintiff, and that such Texas cattle communicated the Texas splenic or Spanish fever to the plaintiff's cattle, from which they sickened and died, and plaintiff was damaged thereby in the sum of $2,500. That said Texas cattle were taken and held in quarantine by the sheriff of Chase County, Kansas, at the commencement of plaintiff's suit, and thereafter, by agreement of all the parties, the court in this cause appointed one T. J. Acheson as its receiver, who took the cattle from the sheriff, and, by consent of all the parties in interest, and upon the order of the court, said receiver had sold said cattle, and had instead thereof the money and proceeds received from said sale. The plaintiff further alleged that the defendants Thomas E. Tutt and D. L. Jones & Brother Live Stock and Commission Company pretended to have some lien upon the fund in the hands of the receiver by virtue of chattel mortgages, but that said claim was inferior and

subordinate to plaintiff's. The petition further alleged that all the other defendants named in the caption of the petition including all the cross-petitioners had an interest in, and claim upon the fund on account of losses of cattle sustained by them because of the said disease of Texas or Spanish fever having been communicated to their cattle by the said Texas cattle. The plaintiff claimed a lien upon the fund in the hand of the receiver by reason of the facts pleaded, as given by the statutes of Kansas above referred to, and in the prayer of the petition the plaintiff demanded judgment against the defendants Hosier Brothers, Missouri, Kansas & Texas Railway Company, Francis Brogan, W. J. Brogan and Joseph N. Brogan in the sum of $3,000 together with the costs of the suit, and asked that the same be adjudged and admitted a lien upon the aforesaid fund prior and superior to any claim made by said defendants Tutt and D. L. Jones & Brother Live Stock and Commission Company, and for all further and proper relief. The statutes of Kansas referred to in Haber's petition are hereinbefore set out in full as part of this statement, pp. 8–15.

The answer and cross-petition of Lantry and Farrington made substantially the same averments as contained in Haber's petition as to the said defendants Hosier Brothers, Missouri, Kansas & Texas Railway Company and the Brogans bringing the cattle into the State, and alleged that the cattle were infected with the disease known as the Texas or Spanish fever and communicated the same to their cattle, and that prior to the commencement of this suit they had brought an attachment suit against the defendants Hosier Brothers and the Brogans in the Chase County District Court, and the sheriff had, under such attachment, levied on the Texas cattle of Hosier Brothers, and that, by reason of such levy, they had the first lien on the said cattle, or the proceeds thereof, and in the prayer of their cross-petition they demanded judgment against the

said defendants Hosier Brothers, the Railway Company and the Brogans for $30,130, and that the same be adjudged a first lien prior and superior to any claim made by any of the parties to this suit.

The answer and cross-petition of H. R. Scroggins reaverred the allegations of Haber's petition, and alleged that the said Texas cattle of Hosier Brothers communicated the Texas or Spanish fever to his cattle to his damage in the sum of $3,550, and prayed a personal judgment therefor against Hosier Brothers, the Railway Company and the Brogans, and that the same be declared a first and prior lien on the money in the hands of the receiver.

The remaining 140 defendants filed separate answers and cross-petitions similar to that of Scroggins, claiming judgments for their damages in varying sums, as shown on pages 14 to 16 of the record.

The answer of the Missouri, Kansas & Texas Railway Company to the petition of the plaintiff Haber, and to the answers and cross-petitions of each and all of the other defendants who had filed cross-petitions demanding affirmative relief, denied each and every allegation in said petition, and in each of said answers and cross-petitions contained, except such as were therein expressly admitted, modified or differently stated. This answer alleged that the defendant was a corporation of the State of Kansas. That during the year 1892 it owned and operated a line of railroad extending from Denison, Texas, to Hannibal, Missouri, and running through the States of Kansas and Missouri, and through the Indian Territory, with a branch from Parsons, Kansas, to Junction City, Kansas, making about 1,200 miles of railway, and that during the year 1892 it was engaged as a common carrier of freight and passenger business, and, as such common carrier, conducted an interstate transportation business. That by the terms of its charter it was a

common carrier of freight and passengers, and had no authority or power to engage in any other business. That The Missouri, Kansas and Texas Railway Company of Texas was a Texas railroad company, with a line of road extending from Denison to Taylor, Texas, and a common carrier of freight and passengers, and a line of road under a separate and distinct management from the Missouri, Kansas & Texas Railway Company, the Kansas corporation. The answer further alleged that the Texas & Pacific Railway Company was a corporation under and by virtue of the laws of the United States, and had a line of railroad extending from Marshall, Texas, to El Paso, Texas, crossing and intersecting The Missouri, Kansas & Texas Railway Company of Texas at Ft. Worth, Texas, and was a common carrier of both freight and passengers. That the town or station of Midland, Texas, was situated on the Texas and Pacific Railway 307 miles west of the station of Ft. Worth, and the same distance west of the line of The Missouri, Kansas & Texas Railway Company, of Texas, and that the lines of the two Missouri, Kansas & Texas railways connected at or near Denison, Texas. The answer further alleged that on April 28, 1892, April 29, 1892, and June 10, 1892, the defendants Hosier Brothers entered into written contracts with the Texas & Pacific Railway Company to transport for them on the first named date 744 head of cattle, and on the second date 644 head of cattle, and on the third date 485 head of cattle. Copies of said contracts were attached to the answer, marked Exhibits A, B, C, D, and L respectively, and made parts thereof. These contracts are bills of lading found at page 26 of the printed record, and were executed at Midland, Texas, and are contracts to transport the cattle from Midland, Texas, to Hartford, Kansas, with the usual clause that the Texas & Pacific Railway Company should not be liable beyond the termination of its own line. The answer

further alleged that Hosier Brothers loaded said cattle into cars furnished to them at Midland, Texas, by the said Texas & Pacific Railway Company, and said cattle were carried to Hartford, Kansas, in the same identical cars into which they were loaded. That Hartford, Kansas, is situated on the line of the Missouri, Kansas & Texas Railway Company in Lyon County, Kansas, and there is no other railway running to said town of Hartford, and that because of that fact it was necessary that the cattle be carried a portion of the distance over the line of the Missouri, Kansas & Texas railway, and the direct line, as well as the quickest, was to deliver them to The Missouri, Kansas & Texas Railway Company of Texas at Ft. Worth, and to the Missouri, Kansas & Texas Railway Company, the Kansas corporation, at or near Denison. The answer further alleged that the Missouri, Kansas & Texas Railway Company received these cattle from the Missouri, Kansas & Texas Railway Company of Texas at Denison as a connecting carrier, and discharged its full duty by transporting the same as quickly as possible and deliver in the same to Hosier Brothers at Hartford, and upon the delivery of the cattle to Hosier Brothers it discharged it full duty, and had no further connection with, or inte est in, the said cattle. The answer further alleged that the defendant had no line of railway running into or through Chase County, Kansas, and that it had nothing whatever to do with the driving of the cattle from Hartford to the Brogan pastures in Chase County, Kansas, nor did it have any connection whatever with the person or persons who drove said cattle across the country from the station of Hartford to the Brogan pasture. As a further defense, the answer pleaded that on February 26, 1892, the Hon. Jeremiah M. Rusk, as Secretary of the Department of Agriculture of the United States, issued and served upon all the railway companies of the United

States, including the Missouri, Kansas & Texas Railway Company, his regulations concerning the transportation of cattle. A copy of said regulations was attached to the answer and marked Exhibit E. That said circular letter establishing regulations concerning the transportation of cattle, was issued in accordance with Sec. 7 of the act of Congress of May 29, 1884, entitled "An Act for the Establishment of a Bureau of Animal Industry to Prevent the Exportation of Diseased Cattle, and to Provide Means for the Suppression and Extirpation of Pleuro-pneumonia and other Contagious Diseases Among Domestic Animals," and of the Act of Congress, approved March 3, 1891, making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1892, which rules and regulations removed all restrictions from the transportation of cattle to and from any portion of the United States except that portion described in said regulations as the area within which the disease known as the splenetic or Southern (meaning Texas splenic or Spanish) fever exists among cattle. The answer further alleged that Midland, Texas, the point from where said cattle was shipped, was wholly outside of the infected district as described in the regulations of the Secretary of the Department of Agriculture, and that said cattle had been kept in Pecos County, Texas, since the 1st day of December, 1891, and had not been east or south of the government quarantine line as established February 26, 1892, by the Department of Agriculture since said December 1, 1891, as would fully appear from the affidavits of M. T. Wilson, T. Ramsey and George B. Hosier dated April 30, 1892, a copy of which was attached and marked Exhibit G and made a part of the answer as were also the affidavits of J. F. Camp, D. G. Franks and George B. Hosier dated June 1, 1892, attached to the answer and marked Exhibit H, and made a part thereof. The answer

also alleged that before the defendant railway company would receive the cattle in question for shipment it compelled Hosier Brothers, the owners of said cattle, to procure from Albert Dean, live stock inspector of the Bureau of Animal Industry, acting under authority of the Department of Agriculture of the United States, permission to ship said cattle into the State of Kansas, and also to procure permission from the State Board of Live Stock Sanitary Commissioners of the State of Kansas to ship said cattle into that State. That said permission from the State Board of Live Stock Sanitary Commissioners was in writing, and the said Albert Dean, under and by virtue of his position and appointment of inspector of the Bureau of Animal Industry, of the United States, and under and by virtue of an appointment from the State Board of Live Stock Sanitary Commissioners of the State of Kansas, had authority to issue such permits. That on the 24th of April, 1892, the said Albert Dean, as such live stock inspector, and by virtue of the authority aforesaid, issued to said Hosier Brothers permission to bring the cattle in question into the State of Kansas over the lines of the Missouri, Kansas & Texas Railway Company, a copy of which permission was attached to the answer and marked Exhibit I, and made a part thereof. That thereafter, on June 3, 1892, by special direction of the Board of Live Stock Sanitary Commissioners of the State of Kansas, said Albert Dean, as such Live Stock Inspector, issued a further permit to said Hosier Brothers to bring into the State of Kansas over the line of the Missouri, Kansas & Texas Railway Company 500 head of cattle, being the cattle in question, a copy of which permit was marked Exhibit J, and was attached to the answer and made a part thereof. The answer further alleged that the defendant railway company never was at any time advised or notified from any source whatsoever that said cattle were infected with Texas or Spanish fever,

or that they were cattle that would be likely to spread the fever or disease known as the Texas or Spanish fever, and that by virtue of its relation to the public as a common carrier, it was bound to receive and transport said cattle.

The regulations concerning cattle transportation issued by the Department of Agriculture under date of February 26, 1892, as alleged in said answer, and Exhibit E thereof, are hereinafter set out. See Assignment of Errors, No. 3, *post*, pp. 51–56. The regulations with accompanying maps describe the area of country which was infected with Texas or Spanish fever and prohibits railroad companies from transporting cattle from that area between March 1st and December 1st, 1892, and therefore necessarily permitted the transportation of cattle not within the infected district.

The affidavits referred to in the answer of Camp, Franks and Hosier, as Exhibit G, and of Wilson and Ramsey and Hosier as Exhibit H, appear at pages 24 and 25 of the Transcript of Record, and they state that the cattle therein referred to, giving their brands, were owned by Hosier Brothers, of Jackson County, Missouri, and that they had been held in a pasture, under a lease by Hosier Brothers, in the county of Pecos, Texas, since the 1st of December, 1891, and that said cattle were healthy and had not come in contact with, or been exposed in any manner to, any cattle that had come east or south of the quarantine line established February 26, 1892, by the United States Department of Agriculture, since the 1st day of February, 1892, and that no contagious or infectious disease to which cattle are subject was known to exist in said pasture or vicinity, and the affidavits of Camp, Franks, Wilson and Ramsey further stated that they were not interested in said cattle as owners or otherwise, and that they were citizens of the county of Pecos, Texas.

Exhibits I and J referred to in the answer, being the

permits of Albert Dean, Inspector, were issued by order of the Live Stock Sanitary Commission of Kansas under the dates of April 24, 1892, and June 3, 1892, and state that the Missouri, Kansas & Texas Railway Company is permitted to ship the cattle of Hosier Brothers to Hartford, Kansas, as the cattle are shown by affidavits to be from Pecos County, Texas.

The map showing the boundary line of the district infected with splenetic or Southern fever of cattle, as defined in the circular orders of Hon. Jeremiah M. Rusk, Secretary of the Department of Agriculture, dated February 26, 1892, is found in the record at page 244, and from that map it appears that Pecos County and Midland station on the Texas & Pacific Railway were each west of the quarantine line, and not within the infected district.

The issues joined by the pleadings between the railway company, the plaintiff and cross-petitioners, were tried together before the court and jury, and on the trial the plaintiff and the cross-petitioners each and all offered testimony showing that Hosier Brothers drove the cattle from their range in Pecos County, Texas, to Midland station on the Texas & Pacific road, and that they were transported by the Texas and Pacific Railway Company, The Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company, the Kansas corporation, to Hartford, Lyon County, Kansas, a station on the last named road, and there delivered to Hosier Brothers, who accepted them and drove them west across Lyon County into Chase County, Kansas, and further offered testimony tending to show that the cattle of the plaintiff and the cross-petitioners respectively caught the Texas or Spanish fever communicated by these Texas cattle of Hosier Brothers while they were being driven across the country from Hartford to the Brogan pasture and while on the pasture.

The defendant railway company introduced testimony showing that the Texas cattle in question belonged to Hosier Brothers, and were held by them in Pecos County, Texas, west of the quarantine line established by the regulations of the Department of Agriculture and not within the infected district since prior to December 1, 1891, and that they were delivered to the Texas & Pacific Company at Midland, and transported thence on the bills of lading of the Texas & Pacific Company introduced in evidence to Hartford, Kansas, having been delivered at Ft. Worth, Texas, to The Missouri, Kansas & Texas Railway Company of Texas, and by that company to the Missouri, Kansas & Texas Railway Company, the Kansas corporation, at the northern line of the State of Texas, near Denison, and transported by the last named company to the station of Hartford, Kansas, in Lyon County, and there delivered to and accepted by Hosier Brothers. That the defendant railway company, its officers and agents, had no knowledge or information that said cattle were in any manner diseased or capable of communicating the Spanish or Texas fever, and that they did not communicate while on their journey, or while in the possession of the railway company, such fever to any other cattle, and that the disease, if any was communicated to other cattle, was so communicated after the defendant railway company had parted with the possession of the Texas cattle. The defendant company introduced in evidence the map found at page 244 of the record showing the boundary line of the district infected with splenic or Southern (that is Texas or Spanish) fever, which map shows that Pecos County and Midland station are west of and not within the infected district.

There was no substantial testimony that the defendant, its officers, agents or employees had any reason to suppose that the Texas cattle were capable of communicating the

Texas fever, and the contrary was clearly established. The only ground on which the claimants contended that the defendant ought to have known was that there were ticks on the Texas cattle which the company could have discovered, and the presence of ticks indicated that the cattle were capable of communicating the disease. The undisputed testimony, however, shows that ticks were common to all cattle during the summer months, and that only experts could detect the differences between the ticks which indicate Texas fever and those which do not (Tr. 154–155, 157). Indeed the claimant's testimony by which they claimed to have established the fact that their cattle were infected or killed by Texas fever was that of expert witnesses, who testified that only by *post-mortem* examinations could it be told that the cattle died from Texas fever; and such *post-mortems* were made (Tr., 148–150).

The testimony offered by the defendant company (Tr. 256–258) proved that the government quarantine line was established far enough west and north to be perfectly safe, and was put in safe territory about two counties from the actually infected district, and that at the time it was established by the officers of the Bureau of Animal Industry there were present representatives of the Sanitary Boards from the Territory of New Mexico and the States of Kansas, Missouri, Wyoming, Illinois and Indiana, and they all concluded and agreed that the line was right and far enough west (Tr., 250).

The defendant company also proved that Hosier Bros. had, during the years 1891, 1892 and 1893, shipped other cattle from their ranch in Pecos Co., Texas, by different railroads to points in Kansas, and that such cattle never communicated the Texas or Spanish fever to the domestic cattle, and that cattle had been so shipped by others from that ranch to Kansas for four or five years prior to 1891, and never communicated the disease to the Kansas cattle.

The defendant company's testimony in full is found in Tr., pp. 177 to 263.

During the progress of the trial the defendant railroad company offered in evidence and asked to be permitted to read to the jury the circular orders of February 26th, 1892, issued by the Department of Agriculture, "Exhibit E" to the answer of said company (see Assignment of Errors, No. 3, *post*, pp. 51-56), and the plaintiff objected to its introduction as incompetent, irrelevant and immaterial and upon no other ground, which objection was sustained by the court, to which action of the court the defendant at the same time excepted.

The defendant railway company further offered to prove by witnesses, A. T. Drew (see Tr., 232) and M. Sweeney (Tr., 212), that it had strictly complied in the shipments of the cattle in question from Texas to Kansas with the rules and regulations of the Secretary of Agriculture of the United States, and the court excluded such proof on the objection of the plaintiff and cross-petitioners, to which action the defendant company at the time excepted.

The defendant having proved that Albert Dean was the duly authorized Inspector of the Bureau of Animal Industry of the Department of Agriculture, and also the live stock inspector of the State of Kansas, offered in testimony two permits, one dated April 24th, 1892, and the other June 3d, 1892, of the Live Stock Sanitary Commission, signed by said Dean by order of said commission, to ship the Texas cattle in question from Texas to Kansas, the cattle being from Pecos Co., Texas (Tr., p. 29), and which permits are hereinafter set out. See Assignment of Errors, No. 11, *post*, pp. 68-69. The trial court refused to admit such testimony and the defendant duly excepted.

At the conclusion of the evidence the defendant railway company requested the court to give the special instruc-

tions to the jury set forth hereafter, — see Assignment of Errors No. 5, *post*, pp. 56–61.

The District Court charged the jury by giving the instructions hereinafter set out. (See assignment of errors No. 6, *post*, pp. 61–67) To the giving and refusing of the instruc tions and each of them the defendant company at the time duly excepted.

From an examination of the instructions refused it will be seen that the trial court refused to instruct the jury that defendant was not liable under the Kansas statute for its act in transporting the Texas cattle from Texas to Kansas, and that such transportation was authorized, required and justified by the laws of the United States, which were paramount to the Kansas statutes.

The instructions given declared the defendant company liable if it brought the cattle from below the south line of Kansas and could have known that the same were liable to communicate the disease of Texas fever; that the fact that the cattle were brought from south of the south line of Kansas was *prima facie* evidence that they were capable of communicating the disease of Texas fever, and that the defendant company had knowledge thereof; and that the defendant company was liable though the disease was communicated to the domestic cattle after the Texas cattle had left its possession and control.

Thereupon the jury returned separate verdicts in favor of the plaintiff and the cross-petitioners against the railway company in varying amounts set forth at page 270 of the record and aggregating about $45,178.19.

As authorized by the laws of Kansas the defendant railway company asked the jury to make certain special findings and return with their verdict, which findings were by the court submitted to the jury, and the answers of the jury to such findings were rendered with their general verdict.

The special questions submitted, and the answers of the jury thereto, are in words and figures as follows: —

"Comes now the Missouri, Kansas and Texas Railway Company, one of the defendants in the above-entitled cause, and asks the court to require the jury to answer the following special questions and return same into court with their verdict in this cause: —

1. Did the railroad company have any actual notice that these cattle or any of them were from the infected district of Texas?

Answer. No.

2. If you answer the above question "Yes," you may then state what agent, servant or employee of the railroad company had such notice or knowledge.

Answer.

3. Did any of the agents, servants, or employees of the railroad company having charge of the handling of the trains in which these cattle were carried have any information or knowledge concerning Texas or splenetic fever?

Answer. We don't know.

4. If you answer the above question "Yes," you may then state what agent, servant, or employee of the company had such information or knowledge.

Answer.

5. Is it not a fact that Francis Brogan did understand by the contract with Hosier Brothers that he was to receive the cattle at either Hartford, Olpe, or Bazaar, as Hosier Brothers might elect?

Answer. Yes.

6. Was not the talk he had with Williams after he had made the contract with Hosier Brothers?

Answer. Yes.

7. What effort would have been necessary for the railroad company to make to ascertain that these cattle were not proper cattle to be shipped north, or that any of them had been in the infected area immediately prior to the shipment thereof?

Answer. They should make a thorough investigation.

8. Did not Hosier Brothers send two men with each train of cattle and was it not the duty of such men to look after and care for the cattle?

Answer. Yes.

9. Did the trainmen or employees of the defendant in charge of the train have anything to do with the handling of the cattle or with the loading or unloading of them?

Answer. No.

10. Was it not the duty of the trainmen in charge of the train in which the Hosier Brothers cattle were shipped to simply look after the management and operation of the train?

Answer. Yes.

11. Is it not a fact that all the information given to the railroad company by Hosier Brothers and by Francis Brogan was to the effect that said cattle were from Pecos County, Texas?

Answer. Yes.

12. Is it not a fact that by the rules and regulations of the Honorable Jeremiah M. Rusk, Secretary of the Department of Agriculture, establishing a quarantine line, Pecos County, Texas, was entirely west and outside of said line?

Answer. Yes; we suppose so.

13. What difference is there between a Texas cattle fever tick and any other kind of tick?

Answer. We don't know.

14. Is it not a fact that Texas fever can be communicated to native cattle by other means than the Texas cattle tick?

Answer. Yes.

15. Is it not a fact that cattle from north and west of the government quarantine line are not supposed by the Bureau of Animal Industry to be inoculated with germs of Texas fever and are supposed to be incapable of communicating it to native cattle?

Answer. Yes; that's the supposition.

16. You may state the distance from Fort Worth to Midland, Texas?

Answer. 307 miles.

17. You may state the distance from Fort Worth to Denison?

Answer. 96 miles.

18. You may state the distance from Denison, Texas, to Hartford, Kansas?

Answer. 344 miles.

19. You may state the distance from Midland, Texas, to the north line of Pecos County, Texas?

Answer. We don't know.

20. Is it not a fact that the ranch and range of Hosier Brothers is located entirely within the boundaries of Pecos County, Texas?

Answer. The ranch is in Pecos County, Texas.

21. Is is not a fact that the Bureau of Animal Industry kept an inspector at Fort Worth, Texas, and one at Parsons, Kansas, whose duty it was to inspect all cattle shipped north over the lines of the railroad company through those places and to stop all cattle coming from inside of the quarantine line or infected area?

Answer. Yes.

22. Is it not a fact that said inspectors determined by the brands of cattle whether they are from north and west of the government quarantine line?

Answer. Yes.

23. Is it not a fact that these cattle were branded with Hosier Brothers' brand?

Answer. The most of them.

24. Was not said brand registered in Pecos County, Texas?

Answer. We don't know.

25. Did not such brands indicate that said cattle were from west of the government quarantine line?

Answer. Yes.

26. Is it not a fact that the railroad company delivered the cattle to Hosier Brothers at Hartford, and until after such delivery no Texas fever was communicated by them and no damage done to the plaintiff or any of the claimants suing under their cross-petitions?

Answer. Yes.

27. If you find that the cattle communicated Texas fever, is it not a fact that such fever was communicated by the drive across the country from Hartford to the Brogan pasture, in Chase County, and the placing of the cattle in such pasture?

Answer. Yes.

28. Who were the owners of these cattle at the time they were driven from Hartford to the Brogan pasture?

Answer. Hosier Bros.

29. Is it not a fact that Hosier Brothers, the owners of the cattle, by their agents, the Brogans, drove the cattle from Hartford to the Brogan pasture?

Answer. Yes; it is alleged so.

30. How many years have Hosier Brothers been shipping cattle from Pecos County, Texas?

Answer. Three years.

31. Did said cattle ever communicate Texas fever at any other time than the time of the shipment to Hosier Brothers at Hartford, Kansas?

Answer. We don't know.

32. Is it not a fact that the defendant The Missouri, Kansas and Texas Railway Company in its business of a common carrier transport cattle every year from Texas under the government quarantine regulations?

Answer: Yes; we suppose so.

33. Does not the defendant The Missouri, Kansas and Texas Railway Company make all reasonable effort to fully comply with and observe all the quarantine regulations promulgated and put in force by the Secretary of the Department of Agriculture, and to observe all the rules and regulations put in force by the State board of live-stock sanitary commissioners of Kansas?

Answer. We don't know, but they had ought to.

34. Is it not a fact that of the cattle transported from the State of Texas over the lines of the Missouri, Kansas and Texas Railway Company that this is the only instance in which any contagious disease was communicated by said cattle?

Answer. We don't know of any other.

B. W. Jay, Foreman.

It will be observed that these special findings are to the effect that the railway company had no connection with the Texas cattle complained of except to transport them from Texas to Hartford station, Kansas: that the cattle were brought from Pecos County, Texas, west of the infected district, established by the Department of Agriculture of the United States: that the cattle were during their entire journey in charge of and cared for by the agents of Hosier Bros., and loaded and unloaded by them: that the company did not know that the cattle were capable of communicating the Texas fever to Kansas domestic cattle: that the Texas cattle while en route and in the possession or under the control of the railway company did not communicate the Texas or Spanish fever to any other cattle; and finally that the Texas cattle did not communicate the Texas or Spanish fever to the cattle of plaintiff or cross-petitioners until after the railroad journey had ended and they had been delivered to and accepted by Hosier Bros.

Under the laws of Kansas the special verdicts control the general verdicts where there is conflict. See Section 4382 G. S. Kansas (1889).

The defendant railway company in due time moved the court for judgment in favor of the railway company upon the special verdicts, notwithstanding the general verdicts, which motion was overruled and to which the company at the time duly excepted.

The defendant railway company also filed motion for new trial which was overruled and due exception taken. Judgments having been rendered against the railway company in favor of the plaintiff and the cross-petitioners, the railway company duly prosecuted its appeal to the Supreme Court of the State, assigning in conformity to the laws of the State that the District Court had erred in rendering judgments against the defendant railway company instead of in its favor, and had erred in refusing to admit the testi-

mony offered and in giving and refusing the instructions hereinafter specifically set forth in the assignment of errors and the Supreme Court, after a full hearing of the case, affirmed the judgments of the court below in an opinion which is found at pages 284 to 297 of the record. The railway company thereupon filed in the Supreme Court a petition and argument for rehearing, which is found at pages 298 to 320 of the printed record. The petition for rehearing was overruled and thereupon the defendant railway company filed its petition for writ of error, which is found at pages 321 to 323, and the writ of error was duly allowed and issued (see Record, 327 and 328).

At every step and stage of the case the defendant company denied liability under the Kansas statute, asserted its acts in connection with the cattle to be that of interstate transportation, authorized, justified and required by Federal laws, and that all State laws attempting to fix responsibility on defendant were void as in conflict with the constitution and laws of the United States.

The opinion of the Supreme Court of Kansas distinctly held that the defendant was liable for the cattle injured by the communication of the Texas fever under Section 3 of Laws of Kansas, 1891, being the general statute 6774 (*supra*, 13), though the Texas cattle were brought into Kansas from a point not within the infected district as fixed by the Federal authorities, and though they had left its possession and control prior to the time when the disease was communicated and the damage done. The opinion also held that the constitution and laws of the United States, notably the act creating the Bureau of Animal Industry (*supra*, pp. 2 to 6) and the regulations of the Secretary of Agriculture thereunder, did not authorize or justify the railway company in bringing the Texas cattle from Texas to Kansas. It further held that there was no conflict between the State law and the Federal law.

The ultimate question to be decided by this court is whether the defendant railway company which simply acted as an agency of interstate commerce in bringing the cattle in question from Texas to Kansas can be held responsible under the Kansas statute for damages resulting to other cattle in Kansas to which the Texas fever was communicated long after the Texas cattle had passed from the possession or control of the defendant railway company.

We shall contend that the defendant company is not liable for the injuries to the cattle of the claimants under the Kansas statutes.

1. Because the Kansas statute: Sections 6774 *et seq.* hereinbefore quoted in full (*supra*, pp. 13 to 15), in so far as they attempt to base liability of the defendant on the transportation of the cattle from Texas to Kansas is void as an attempted regulation of interstate commerce and in conflict with the constitution of the United States which confers upon Congress exclusive jurisdiction over such commerce.

2. Because Congress by the act of May 29th, 1884, creating the Bureau of Animal Industry (*supra*, pp. 2 to 6), has provided for the regulation of the transportation of diseased cattle or cattle liable to communicate the Texas or Spanish fever from one State to another, and such legislation is exclusive and the statutes of Kansas are void in so far as they attempt to deal with that question, and hence cannot be the foundation for any cause of action against the defendant company.

3. Because under the constitution and laws of the United States, notably the commerce clause of the constitution, the interstate commerce act and the act of Congress of June 15th, 1866, to facilitate commercial, postal and military communication among the several States (*supra*,

p. 7), the defendant railway company not only was authorized and justified but required to transport the Texas cattle in question from Texas to Kansas.

4. Because even if the Texas cattle in question were capable of communicating the Texas or Spanish fever to the Kansas cattle and the defendant company knew that fact (which it did not as conclusively shown by the special findings of the jury), then the liability of the defendant company, if any, could be based only on the Federal law and not on the State law. If as in the opinion of the Supreme Court of Kansas (Tr. 289-297) intimated, the defendant violated Sec. 6 of the act of Congress of May 29th, 1884, in transporting the Texas cattle, then the defendant could be sued therefor only under the Federal statute, and if such suit had been brought the defendant company would have had the right to remove the case to the United States Circuit Court of Kansas and had it there tried according to the methods of procedure of that court. It is a universal and fundamental rule of pleading in Kansas as elsewhere that when a suit is founded upon a statute the same must be plead. The claimants have never sued on the Federal statute but have sued alone on the Kansas statute.

5. Because under the express provisions of the Federal constitution, section 2, article 6, it is provided that the constitution and laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding, which provision the Supreme Court of Kansas failed to recognize and enforce in this case.

ASSIGNMENT OF ERRORS.

1. The Supreme Court of Kansas erred in affirming each and all of the judgments of the District Court of Lyon County, in favor of plaintiff and cross-petitioners and against the defendant railway company.

2. The Supreme Court erred in refusing to reverse each and every of said judgments of the said District Court.

3. The Supreme Court erred in refusing to reverse the judgments of the said District Court for its refusal to admit in evidence the regulations of the Department of Agriculture of the United States, which are in words and figures as follows:—

Exhibit E.

REGULATIONS CONCERNING CATTLE TRANSPORTATION.

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., February 26, 1892.

To the Managers and Agents of Railroad and Transportation Companies of the United States, Stockmen and Others:—

The regulations concerning cattle transportation issued by this Department January 11, 1892, are hereby revoked, and the following prescribed in place thereof:—

In accordance with section 7 of the act of Congress approved May 29, 1884, entitled "An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-

pneumonia and other contagious diseases of domestic animals," and of the act of Congress approved March 4, 1891, making appropriation for the Department of Agriculture for the fiscal year ending June 30, 1892, *you are hereby notified that a contagious and infectious disease known as splenetic or Southern fever exists among cattle in the following-described area of the United States:—*

All that country lying east and south of a line commencing at the southwest corner of Valverde County, State of Texas, on the Rio Grande River; thence running northerly along the western boundaries of Valverde and Crockett Counties, to the northwest corner of Crockett County; thence easterly along the northern boundaries of Crockett and Schleicher Counties to the southeastern corner of Irion County; thence northerly along the eastern boundary of Irion County to the northeast corner of said county; thence northerly to the southern boundary of Coke County; thence westerly to the southwestern corner of Coke County; thence northerly along the western boundary of Coke County to the southern boundary of Mitchell County; thence easterly to the southeast corner of Mitchell County, and thence northerly along the western boundaries of Nolan and Fisher Counties to the southern boundary of Kent County; thence easterly along the southern boundary of Kent County to the southwestern corner of Stonewall County; thence northerly along the western boundary of Stonewall County to the southeastern corner of Dickens County; thence easterly along the northern boundary of Stonewall County to the southwestern corner of Knox County; thence northerly along the western boundaries of Knox and Hardeman Counties to the Red River; thence northwesterly following the Red River to its point of intersection with the one hundredth meridian of longitude; thence northerly from said point of intersection along said one hundredth meridian to the southern boundary of the State of Kansas; thence easterly along the southern boundary of the State of Kansas to the northeast corner of the Indian Territory; thence southerly along

the eastern boundary of the Indian Territory to the southwest corner of the State of Missouri; thence easterly along the southern boundary of the State of Missouri to the Mississippi River; thence running southerly along the Mississippi River to the southwestern corner of the county of Lauderdale, State of Tennessee; thence running easterly, following the southern boundaries of the counties of Lauderdale, Crockett, Gibson, Carroll, Benton, Perry, Lewis, Maurey, Marshall, Bedford, Coffee, Grundy, Sequatchie, Hamilton, Meigs, Mc Minn, and Monroe, State of Tennessee, to the eastern boundary of said State; thence following the northern boundaries of the counties of Cherokee, Macon, Jackson, Transylvania, and Henderson, State of North Carolina, to the southeast corner of the county of Buncombe of said State; thence in a northeasterly direction, following the Blue Ridge Mountains, to the southwestern corner of the county of Madison, State of Virginia; thence easterly along the southern boundaries of the counties of Madison, Culpeper, and Stafford; thence northerly along the eastern boundary of Stafford County to the Potomac River; thence following the Potomac River southerly to the Chesapeake Bay; thence easterly along the southern boundary of the State of Maryland to the Atlantic Ocean.

From the 1st day of March to the 1st day of December, 1892, no cattle are to be transported from said area to any portion of the United States north or west of the above-described line, except by rail for immediate slaughter, and when so transported the following regulations must be observed:—

1. When any cattle in course of transportation from said area are unloaded north or west of this line to be fed or watered, the places where said cattle are to be so fed or watered shall be set apart and no other cattle shall be admitted thereto.

2. On unloading said cattle at their points of destination, pens shall be set apart to receive them, and no other cattle shall be admitted to said pens; and the

regulations relating to the movement of Texas cattle, prescribed by the cattle sanitary officers of the State where unloaded, shall be carefully observed. The cars that have carried said stock shall be cleansed and disinfected before they are again used to transport, store, or shelter animals or merchandise.

3. All cars carrying cattle from said area shall bear placards stating that said cars contain Southern cattle, and each of the waybills of said shipments shall have a note upon its face with a similar statement. Whenever any cattle have come from said area and shall be reshipped from any point at which they have been unloaded to other points of destination, the cars carrying said animals shall bear similar placards with like statements, and the waybills be so stamped. At whatever point these cattle are unloaded they shall be placed in separate pens, to which no other cattle shall be admitted.

4. The cars used to transport such animals, and the pens in which they are fed and watered, and the pens set apart for their reception at points of destination, shall be disinfected in the following manner: —

(*a*) Remove all litter and manure. This litter and manure may be disinfected by mixing it with lime, or diluted sulphuric acid, or, if not disinfected, it may be stored where no cattle can come into contact with it until after December 1.

(*b*) Wash the cars and the feeding and watering troughs with water until clean.

(*c*) Saturate the walls and floors of the cars and fencing troughs and chutes of the pens with a solution made by dissolving four ounces of chloride of lime to each gallon of water. Or disinfect the cars with a jet of steam under a pressure of not less than fifty pounds to the square inch.

5. It is expressly provided that cattle may be moved from those counties in the State of Tennessee which lie south of the line hereinabove described to those

counties lying north of said line in said State, for grazing purposes, in accordance with the regulations of the authorities of the State of Tennessee.

6. It is further expressly provided that cattle which have been at least ninety days in the counties of Coke, the eastern portion of Tom Green, Nolan, Fisher, Stonewall, Haskell, Knox, and Hardeman, State of Texas, which lie within the above-described area, may be moved from said counties by rail into the States of Colorado, Wyoming, and Montana, in accordance with the regulations made by said States for the admission of Southern cattle thereto: *Provided*—

(1) That cattle from said area shall go into said States only for slaughter or grazing, and shall on no account be shipped from said States into any other State or Territory of the United States before the 1st day of December, 1892.

(2) That such cattle shall not be allowed in pens or on trails or on ranges that are to be occupied or crossed by cattle going to the Eastern markets before December 1, 1892, and that these two classes of cattle shall not be allowed to come into contact.

3. That all cars which have carried cattle from said area shall, upon unloading, at once be cleaned and disinfected in the manner provided by these regulations.

(4) That the State authorities of the States of Colorado, Wyoming, and Montana agree to enforce these provisions.

The losses resulting yearly to the owners of susceptible cattle, both in the interstate and export trade, by the contraction of this disease from exposure in unclean and infected cars and pens, and by means of the manure carried in unclean cars from place to place, have become a matter of grave and serious concern to the cattle industry of the United States. It is absolutely essential therefore that this cattle industry should be protected as far as possible by separating the dangerous cattle and by the adoption of efficient methods of disinfection.

Inspectors will be instructed to see that disinfection is properly done, and it is expected that transportation

companies will promptly put into operation the above methods.

Very respectfully,
J. M. Rusk,
Secretary.

4. The Supreme Court erred in refusing to reverse the judgments of said District Court for its refusal to admit the testimony of A. T. Drew and M. Sweeney to the effect that the defendant railway company in the shipment of the Texas cattle in question conformed to the foregoing regulations of the Department of Agriculture.

5. The Supreme Court erred in refusing to reverse the judgments of the said District Court for its failure to give each and every of the following instructions to the jury requested by the defendant railway company, viz.:—

"In this case the plaintiff, Charles Haber, brings his action against the Missouri, Kansas & Texas Railway Company and others to recover the sum of $3,000.00, which he alleges in his petition is the amount of damage which he sustained by reason of the loss of certain of his cattle which he claims died of the disease known as Texas fever, and that said disease was communicated to his cattle by cattle from the State of Texas, which he alleges were transported into the State of Kansas by the Missouri, Kansas & Texas Railway Company, in violation of law, with the knowledge on the part of said railway company that said cattle so transported by it were inoculated with germs of Texas fever, and that if such fact was not known to the said railway company, its agents, servants, and employees, that by ordinary care and diligence such facts might have been known to it."

The defendant in its answer sets up a general denial of all the allegations of the plaintiff's petition. It further sets up as a defense to the allegations of the plaintiff's petition the rules and regulations established

by the Secretary of the Department of Agriculture, in accordance with power given him by the act of Congress of May 29th, 1884, entitled 'An act for the establishment of a Bureau of Animal Industry to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals,' and subsequent acts of Congress upon the same subject supplemental or amendatory thereof. The defendant also relies upon certain permits which were issued to the owners of the cattle by the State Board of live-stock sanitary commissioners, which are to the effect that said cattle might be brought into the State of Kansas over the lines of the Missouri, Kansas and Texas Railway Company; also that there is misjoinder, and that by reason of such misjoinder this court has no jurisdiction; also the further defense that this case has been settled or agreed to be settled between the claimant and Hosier Brothers, who, it is alleged in the petition of the plaintiff, are jointly liable with the defendant. To this answer reply has been filed by plaintiff denying all the allegations therein contained.

There is no controversy but what the rules of the Secretary of the Department of Agriculture were substantially complied with. There is no controversy but what the permits alleged in the answer of the defendant were duly issued to Hosier Brothers, the owners of the cattle, by order of the State Board of live-stock sanitary commissioners.

The law of Congress of May 29th, 1884, provides that it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of contagious diseases, and to certify such rules and regulations to the executive authority of each State and Territory and invite such authorities to co-operate with him in the execution and enforcement thereof. Said act further provides that the plans and methods of the Commissioner of Agriculture may be accepted by any State or Territory.

It appears that the plans and methods of the Secretary of the Department of Agriculture were duly accepted by an act of the legislature of the State of Kansas entitled 'An act authorizing the live-stock sanitary commissioners to co-operate with the Federal authorities and accepting the provisions of an act of Congress to provide for the suppression of contagious diseases among domestic animals,' approved March 26th, 1884; and that since said time the said board of live-stock sanitary commissioners have been co-operating with the Federal authorities under the rules and regulations prescribed by the Department of Agriculture for the suppression and extirpation of diseases among domestic animals.

You are further instructed that by virtue of said law of Congress and by virtue of the act of the legislature of the State of Kansas of March 26th, 1884, to which your attention has been called, the rules and regulations adopted by the Department of Agriculture became a portion of the governing law of the State of Kansas upon this subject, and that under and by virtue of the act of Congress herein referred to the Secretary of the Department of Agriculture has the power to establish a quarantine line and to declare in what portion of the country pleuro-pneumonia and other contagious diseases exist, and that on February 26th, 1892, he established such quarantine line, and due notice thereof was given to all transportation companies in the United States, and such quarantine line under the act of the legislature herein referred to became the quarantine line of the State of Kansas.

You are further instructed that railroad companies or other transportation companies cannot refuse to receive cattle and transport them when originating north or west of the quarantine line as then established by the Department of Agriculture.

You are further instructed that the railroad companies or transportation companies cannot, when cattle are tendered them for shipment outside of the quarantine line, make any inquiry in regard to the health and condition of the cattle further than to disclose the

fact that the cattle are apparently healthy and that they have been kept north and west of the quarantine line." [Tr. 263–264.]

Which the court refused to do; to which action of the court in refusing to give said special instructions the defendant the Missouri, Kansas and Texas Railway Company at the time duly excepted.

And thereupon the said defendant requested the court to instruct the jury to find for the defendant the Missouri, Kansas and Texas Railway Company; which said instruction the said court refused to give; to which action of the court in refusing to give said instruction the defendant the Missouri, Kansas and Texas Railway Company at the time duly excepted. [Tr. 264–265.]

And thereupon the said defendant requested the court to give the jury the following special instructions which the court refused to do, to wit:—

"Before you can find for the plaintiff in this case you must find that the agents, servants, and employees of the defendant in charge of the trains bringing said cattle into Kansas had such knowledge of Texas cattle and the disease known as Texas fever, that they could, in the ordinary discharge of their duties in handling said trains, have discovered the fact that such cattle were inoculated with fever and were liable to communicate the disease to native cattle; and if you find that the agents, servants, and employees of the defendant did not have such knowledge, or that such knowledge was not brought to the attention of the railway company, you will find for the defendant company." [Tr. 265.]

"If you find that the defendant company received the cattle at Denison, Texas, from a connecting carrier and transported the same in the ordinary way, and the only negligence of which the plaintiff complained is that the employees of the defendant in handling the trains in which these cattle were carried did not dis-

cover that they were of a kind calculated to communicate Texas fever, and the railroad company was guilty of no improper conduct in carrying or handling said cattle by which the fever was communicated to the plaintiff's cattle and the cattle of the other complainants, you will then and in that case find for the defendant company." (Tr. 265.)

"If you find from all the evidence in this case that the railroad company unloaded the cattle at the station of Hartford, as under its contract with Hosier Brothers it was bound to do, and that the fever was occasioned entirely by the driving of said cattle across the country from Hartford to the Brogan pasture at Bazaar, in that case you will find for the defendant company." (Tr. 265.)

"You are further instructed that it is not presumed that the agents, servants, and employees of the defendant company had any knowledge of Texas cattle or the locality they are from or whether they are liable to communicate Texas fever or not, unless it is shown affirmatively that they had some special knowledge of the disease known as Texas fever, and if you find that the agents, servants, and employees had no such special knowledge, then you will find for the defendant company." (Tr. 265.)

"If you find that the permits had been duly issued by the State board of live-stock sanitary commissioners to Hosier Brothers to bring these cattle into the State of Kansas over the lines of the Missouri, Kansas and Texas Railway Company, you will in that event find for the defendant company, unless you find that such permits were fraudulently obtained or issued and that the railroad company knew that fact, or unless you further find that the railroad company knew that the permits had been wrongfully or mistakenly issued." (Tr. 265–266.)

To which action of the court in refusing to give each of the above instructions defendant company at the time excepted.

And the defendant company also requested the court to give the following special instructions:—

1. "You are instructed that the shipment of the cattle in question over the defendant's road from Denison, Texas, to Hartfoad, Kansas, was an act of interstate commerce, and that, as to such shipment, the authority of the United States government and its rules and regulations established by its Bureau of Animal Industry under the act of Congress creating such bureau are paramount to the authority of the State of Kansas, and, in case of a conflict between the rules and regulations of the United States and those of the State in relation to this cattle shipment, the State laws and regulations must give way.

2. "If you believe from the evidence that the defendant in good faith complied with the laws and regulations of the United States government in regard to the shipment of the Hosier cattle, and had the regular permit from the government inspector, then you will find for the defendant.

3. "If the permits from the general government and the State live-stock sanitary commission were duly issued to Hosier Bros. and accepted by the R. R. Co. in good faith, and the shipments made thereunder by the railroad company without any actual knowledge that the Hosier cattle were capable of communicating the disease of Texas fever, you will find for the defendant, because under such circumstances the said permits furnished to the R. R. Co. complete protection."

The court refused to give each and every of the instructions above set forth, and to the action of the court the defendant railway company at the time excepted. (Tr. 266.)

6. The Supreme Court erred in not reversing the judgment of said court for its erroneous charge given to the jury as follows:—

"1. It appears that Hosier Bros., defendants herein, in the spring of 1892, owned and controlled a ranch consisting of many thousands of acres in Pecos County, Texas, upon which were grazed and permitted to range unrestrained many thousand head of Texas cattle; that in April of said year the said Hosier Bros., entered into a contract with F. Brogan & Sons, of Hartford, Lyon County, Kansas, whereby said Brogan & Sons were to receive from said Hosier Bros. about 2,500 head of the said Texas cattle at some point in said Lyon County, to be by the Brogans taken to their ranch in Chase County, Kansas, and there grazed by them during the summer of 1892; that in compliance with the said agreement the said Hosier Bros. caused to be shipped of said cattle from said Pecos County, Texas, over the Missouri, Kansas & Texas Railway, defendant, into Kansas in the spring and summer of 1892, about 2,500 head of the said Texas cattle, which cattle were delivered by the said defendant railway company at Hartford, Kansas, in its stock yards, to said Brogan & Sons, and were by them driven through Lyon and Chase Counties to their said range, in said Chase County, Kansas. These cattle the plaintiff herein and the said cross-petitioners herein, seeking to recover in this action against the said defendant railway company, allege communicated to the domestic cattle of the said plaintiff and the said cross-petitioners the Texas, splenic, or Spanish fever, and this action is brought and prosecuted to recover of said defendant railway company the damages which they allege they suffered by reason of the said Texas cattle communicating to their cattle the said Texas, splenic, or Spanish fever.

There are other defendants in the action than the said railway company from whom the plaintiff and the cross-petitioning defendants claim they are also entitled to recover damages, but the issue now submitted to you is only as to the liability of the defendant railway company to this plaintiff and said cross-petitioning defendants and the amount of such liability, if anything.

2. The defendant denies its liability to the plaintiff herein or to any of the cross-petitioners for any sum whatever."

"3. The statute of Kansas provides that any person or persons who shall drive, ship, or transport or cause to be driven, shipped, or transported into or through any county in the State any cattle liable to or capable of communicating Texas, splenic, or Spanish fever to any domestic cattle of this State shall be liable to any person or persons injured thereby for all damages they may sustain by reason of the communication of said disease of Texas, splenic, or Spanish fever, to be recovered in a civil action in any court of competent jurisdiction. The term 'persons' in this law means corporations as well as natural persons.

"4. The mere fact that the cattle of the plaintiff or those of any of the cross-petitioning defendants became sick and died from this disease imparted to them by cattle transported by the said defendant into Lyon or Chase Counties is not sufficient to warrant a finding against said defendant railway company. You must find from the evidence, first, that Texas cattle were, in fact, brought into this State. Of this there is no denial and you can consider that fact as established. Second, that the cattle of the plaintiff, and each of the cross-petitioning defendants, who seek to recover herein against said railway because of the loss of cattle, became infected and died because of the disease imparted to them by such Texas cattle, and that such disease was Texas, splenic, or Spanish fever; and, third, that the officers, employees, or agents of the railway company, defendant, had knowledge that such Texas cattle transported by it to this State were liable to impart such disease to the native cattle of this State, or that they ought, by the exercise of diligence and care to have known of the dangerous character of these cattle, and that they would or were liable to impart said disease to the native cattle of this State.

"5. The statute of this State makes the fact of bringing any cattle from south of the south line of

Kansas, between the first day of February and the first day of December, *prima facie* evidence that such cattle were capable of communicating and liable to impart Texas, splenic, or Spanish fever, and that the person in charge of such cattle had full knowledge and notice of their ability to impart such disease to the native cattle."

"6. It is claimed by the plaintiff and the cross-petitions of defendants that the presence of what is known as the Texas cattle tick on cattle recently brought from the southern portions of Texas indicates that such cattle are capable of and liable to impart the Texas fever to the native cattle of this State, and that these Hosier cattle had such ticks on them. If you find from the evidence that these Hosier cattle, brought from Pecos County, Texas, at the season they were brought, had upon them Texas cattle ticks, and were capable of or liable to communicate the Texas, splenic, or Spanish fever to domestic cattle in Kansas, it became the duty of the railroad company, its servants, agents, or employees, to exercise due care and caution to ascertain the presence of such ticks, and it was their duty to examine such cattle to ascertain whether or not they were present. They could not shut their eyes or fail to investigate and then claim that they were not aware of the dangerous character of these cattle. The railway company, defendant, is charged with the knowledge that a reasonable and fair examination and inquiry made by it, its employees and agents, would have imparted and with the knowledge of any fact which, by the exercise of ordinary care and diligence, it would have learned.

"7. The defendant railway company set out in its answer certain so-called permits, issued by the Live Stock Sanitary Commission of the State of Kansas, permitting the shipment of these cattle. The court instructs you that, even if the cattle therein described were the ones actually shipped by the company to Hartford, yet such permits would constitute no defense, as there is no warrant or authority in the law

authorizing the issuance of any such permits, and, notwithstanding the issuance of such permits, the railway company would be liable the same as though they had not been issued, provided you should find they are liable at all.

"8. You are further instructed that it is immaterial whether or not the Hosier Brothers had a contract with the defendant railroad company to bring these cattle from Midland, Texas. The fact that it did bring them from some point on its line of road south of the south line of Kansas makes it liable, provided it had knowledge, if such is the fact, of the dangerous character of these cattle, or ought to have known it under the instructions heretofore given you.

"9. It is the duty of any one in the pursuit of any lawful business to exercise due care and caution that others shall not be injured thereby; and while a common carrier, such as is the defendant railway company, is bound to accept for transportation any freight tendered it which it may be lawful to carry, it must exercise due care and caution in doing this that it does not invade the rights of others, and it is not required to take for transportation or to transport any article forbidden by the law to be transported or the transportation of which will injure others, provided it can ascertain by due diligence that such article is liable to injure or cause damage to those with whom it may come in contact during its transportation or at its destination.

"10. If you find from the evidence that the defendant railway company is liable, then you will return a verdict in favor of the plaintiff, assessing his damages at the amount heretofore fixed by the arbitration commissioners, and you will also return a verdict in favor of each of the cross-petitioning defendants who suffered damages by reason of the introduction of the Texas fever by the Hosier cattle in the amount fixed by said commissioners where the same has been fixed, and in the cases where such amount has not been so fixed,

then in the amount you find such defendants ought to recover from the evidence.

"11. The issues raised by the cross-petition of F. Brogan and Sons and Hosier Brothers are not submitted to you.

"12. It is not necessary in order to enable the plaintiff and cross-petitioners to recover from the defendant railway company that said company, its agents or employees, should have actual knowledge that these cattle which it transported to Hartford were dangerous or liable to communicate to native cattle the Texas fever. It is sufficient to make defendant company liable if such agents and employees had reason to know that such cattle were dangerous, and could have known it by the exercise of ordinary care and diligence.

"13. The burden of proof is upon the plaintiff and the cross-petitioners seeking to recover herein to establish their right to recover by a preponderance of the evidence.

"14. By a preponderance of the evidence does not necessarily mean by the greater number of the witnesses, but by it is meant that degree or condition of the proof which, when considered in the light of all the testimony in the case, seems to be the most reasonable, the most consistent, and the most satisfactory.

"15. You are the exclusive judges of the evidence, of its weight, and of the credibility of the witnesses, and in determining the credibility of the witnesses and in determining the credibility of a witness and the weight that you shall give his testimony you may properly take into consideration the interest of such witness, if any he may have, in the result of the action; his bias or prejudice, if any, for or against the party for or against whom such witness testifies; his powers of memory and of observation, his demeanor on the witness-stand, his intelligence, and the general reasonableness and consistency of his statements and any

other facts or circumstances disclosed by the evidence which in your judgment adds to or detracts from the credibility of such witness."

To which action of the court in giving each of said instructions (Tr. 266 to 269) the defendant company at the time duly excepted. (Tr. 270)

7. The Supreme Court erred in not reversing the judgments of the District Court for its failure to enter judgments for the defendant company on the special verdicts of the jury notwithstanding the general verdicts.

8. The Supreme Court erred in holding the defendant company liable under the Kansas statute to plaintiff and cross-petitioners for its act in bringing the Texas cattle into the State and in not holding that the Kansas statute was void as in conflict with the constitution and laws of the United States, viz.: the clauses of the constitution of the United States giving Congress power to regulate commerce among the several States and with the Indian tribes (Sub. 3, Sec. 8, Art. 1), and declaring the constitution and laws of the United States to be the supreme law of the land (Sec. 2, Art. 6) and the act of Congress approved May 29th, 1884, entitled "An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals (*supra*, pp. 2 to 6);" the act of Congress approved March 4th, 1891, making appropriations for the Department of Agriculture (*supra*, p. 7); the act of Congress regulating commerce approved February 4th, 1887, and amendatory acts known as the interstate commerce commission laws; the act of Congress approved June 15th, 1866, entitled "An act to facilitate com-

mercial, postal and military communication among the several States (*supra*, p. 7)."

9. The said Supreme Court erred in not holding that the defendant railroad company was authorized, justified and required to transport the Texas cattle in question from Texas to Kansas under the constitution and laws of the United States.

10. The said Supreme Court erred in not holding that the defendant company was and could in no way be held responsible for the act of transportation of the Texas cattle in question from Texas to Kansas and that its liability therefor, if any, could be only a liability arising under the laws of the United States.

11. The Supreme Court erred in refusing to reverse the judgments of said District Court for its refusal to admit in evidence the two permits of the Live Stock Sanitary Commission of Kansas signed by order of said commissioner, by Albert Dean, Inspector, who was also Live Stock Inspector for the Bureau of Animal Industry of the Department of Agriculture of the United States, the said permits being Exhibits I and J to the answer of the defendant railway company (Tr. 29), and being in words and figures as follows, to wit:—

35 EXHIBIT "I."

State of Kansas:

CATTLE INSPECTOR'S OFFICE,
KANSAS CITY, KANSAS, April 24th, 1892.

The Missouri, Kansas & Texas Railroad Company is hereby permitted to ship to Hartford, Kansas, 1,501 head of cattle, consigned to Hosier Brothers.

Said cattle are shown by affidavit in this office to

have been from Pecos County, Texas. These cattle are branded t $\overline{8}$ and other brands.

By order of Live Stock Sanitary Commission.

ALBERT DEAN, Inspector.

EXHIBIT "J."

State of Kansas:

CATTLE INSPECTOR'S OFFICE,
KANSAS CITY, KANSAS, June 3rd, 1892.

The Missouri, Kansas & Texas Railroad Company is hereby permitted to ship to Hartford, Kansas, 500 head of cattle, so consigned to Hosier Brothers.

Said cattle are shown by affidavit in this office to have been from Pecos County, Texas. These cattle are branded t $\overline{8}$ and other brands.

By order of Live Stock Sanitary Commission.

ALBERT DEAN, Inspector.

ARGUMENT.

I.

The Acceptance of the Cattle for Carriage by the Railroad Company and the Carriage of the same from Denison, Texas, to Hartford, Kansas, was an Act of Interstate Commerce.

Commerce is defined by this Court to mean trade or traffic, and when carried on between the States it is termed interstate commerce. Trade and traffic may be commerce locally, but to be interstate commerce there must be intercourse between the States, and the definition has been settled by the repeated decisions of this Court that interstate commerce is intercourse between the States. This may consist of transportation, or it may consist of communications; but interstate commerce embraces elements which are not embraced within the term commerce when applied to local trade or traffic. Interstate commerce may consist alone of communications sent from one State to another, or it may consist of transportation alone from one State to another. The transportation by one individual of his property from one State to another is interstate commerce, so that transportation is not only considered, and by some of the earlier decisions was termed an element of commerce, in the later decisions it is defined to be commerce itself.

In the case of Gibbons *v.* Ogden, 9th Wheaton, page 1, this Court had this question before it and in that case very fully defined the terms commerce and interstate commerce, and also the subjects embraced within those terms, or, perhaps more properly speaking, the elements constituting

the term interstate commerce. And when speaking with reference to paragraph 3, section 8 of article 1 of the constitution which provides that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes, Chief Justice Marshall used the following language: —

> "The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term applicable to many objects, to one of its significations. *Commerce, undoubtedly, is traffic, but it is something more; it is intercourse.* It describes the commercial intercourse between nations, and parts of nations, in all its branches, *and is regulated by prescribing rules for carrying on that intercourse.* The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.
>
> "If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation. It was so understood, and must have been so understood, when the constitution

was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense; because all have understood it in that sense, and the attempt to restrict it comes too late.

"If the opinion that 'commerce,' as the word is used in the constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

"It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted — that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

"The 9th section of the first article declares that 'no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another.' This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, 'nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another.' These words have a direct reference to navigation."

And also continuing on this same subject he said in the same case:—

"The word used in the constitution, then, compre-

hends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted, as if that term had been added to the word 'commerce.'

"To what commerce does this power extend? The constitution informs us, to commerce 'with foreign nations, and among the several States, and with the Indian tribes.'

"It has, we believe, been universally admitted *that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.*

"If this be the admitted meaning of the word, in its application to foreign nations, *it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.*

"The subject to which the power is next applied is to commerce 'among the several States.' The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.

"It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and it is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumera-

tion of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

"But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. *If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.*

"This principle is, if possible, still more clear, when applied to commerce 'among the several States.' They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. *What is commerce 'among' them; and how is it to be conducted? Can a trading expedition between two adjoining States commence and terminate outside of each? And if the trading intercourse be*

between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. The sense of the nation, on this subject, is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore."

Again, in the case of Welton *v.* The State of Missouri, 91 U. S. 275, Mr. Justice Field in defining the term commerce said: —

"*Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms including the transportation*, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, *and between the citizens of different States.* The power to regulate it embraces *all the instruments* by which such commerce may be conducted."

The case of Norfolk & Western Railway Company *v.* Commonwealth of Pennsylvania, 136 U. S., page 114, was one where the legislature attempted to impose a license tax upon all foreign corporations, except foreign insurance companies, and provided they should not have an office within the State until they had paid to the auditor-general the amount of such license tax, and providing a penalty for refusing to do so. The company defended upon the ground that it was engaged in interstate commerce and consequently was not liable for the

tax, and the question was whether the business of the company in the State of Pennsylvania was interstate commerce and, second, whether the tax was a tax upon its business. The court decided the first proposition in the affirmative, that its business within the State was interstate commerce, and the language of the court is as follows:—

> "The question before us is thus narrowed to the two following inquiries: (1) Was the business of this company in the State of Pennsylvania interstate commerce? (2) If so, was the tax assessed against it for keeping an office in Philadelphia, for the use of its officers, stockholders, agents and employees, a tax upon such business? We have no difficulty in answering the first of these inquiries in the affirmative. Although the findings of fact are somewhat meager on this question,— much more so, indeed, than the undisputed evidence in the case warranted,— enough is stated in the second paragraph of the aforesaid finding to show that the company is engaged in interstate commerce in the State. It is there said, in substance: By virtue of its connections and certain traffic contracts with other railroads, the Norfolk & Western Railroad Company 'has become a link in a through line of road, over which, as part of the business thereof, freight and passengers are carried into and out of this commonwealth.' That is to say, the business of the through line of railroad, of which the plaintiff in error forms a part, or in which it is a link, consists, in a measure, of carrying passengers and freight into Pennsylvania from other States, and out of that State into other States. It certainly requires no citation of authorities to demonstrate that such business — that is, the business of this through line of railroad — is interstate commerce. That being true, it logically follows that any one of the roads forming a part of, or constituting a link in, that through line, is engaged in interstate commerce, since the business of each one of those roads serves to increase the volume of business done by that through line."

We also desire this Court to consider the case of the Daniel Ball, decided by Mr. Justice Field and found in 10th Wallace, page 557. The Daniel Ball was engaged in the transportation of merchandise upon Grand river wholly within the State of Michigan, between the cities of Grand Rapids and Grand Haven. She was libeled for not paying a fee due the United States as a license fee under the act of July 7th, 1838, 5th Statutes at Large, 304, and the defense was made that being engaged in traffic upon Grand river wholly within the limits of the State of Michigan, she was not subject to the act of Congress; that only those vessels that crossed State border lines were subject to the license fee of Congress, but that the Daniel Ball was subject only to such regulations as the State of Michigan might impose. The contention was not sustained. Justice Field rendered the decision, and upon this question his language is as follows:—

> "But it is contended that the steamer, Daniel Ball, was only engaged in the internal commerce of the State of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand river is a navigable water of the United States; and this brings us to the consideration of the second question presented.
>
> "There is, undoubtedly, an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce 'among the several States,' with foreign nations, and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated and, of course, that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States. Gibbons *v.* Ogden, 9 Wheat. 194. In this case it is admitted that the steamer was engaged in shipping and transporting, down Grand river, goods destined and marked for other States than Michigan, and in receiving and trans-

porting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed *in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.* The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

To the same purport and effect are the following cases:—

Passenger Cases, 7 Howard, 283;
Brown *v.* Maryland, 12 Wheat. 419;
Wabash *v.* St. Louis & Pac. Ry. Co., 118 U. S. 557;
Fargo *v.* Michigan, 121 U. S. 230;
Bowman *v.* R. R. Co., 125 U. S. 465;
Mobile *v.* Kimball, 102 U. S. 691;
Coe *v.* Errol, 116 U. S. 517;
Leisey *v.* Hardin, 135 U. S. 100;
Bennett *v.* American Express Co., 83 Me. 236;
Hardy *v.* A. T. & S. F. R. R. Co., 32 Kan. 698;
Hall *v.* Decuir, 95 U. S. 485;
Gulf, Col. & Santa Fe *v.* Hefley, 158 U. S. 98;
Walling *v.* Michigan, 116 U. S. 466;

Robin *v.* Shelby Taxing Dist., 120 U. S. 489;
Brown *v.* Hanstan, 114 U. S. 622;
Grimes *v.* Eddy, 28 S. W. 756;
Western Union Tel. Co. *v.* Pendleton, 122 U. S. 347.

From these cases it would seem that the law is now well settled that transportation of a commodity from one State to another is interstate commerce. Not only is that proposition settled, but the cases above cited go further and settle the question that even though the line of railroad or other means of transportation lies wholly within the limits of a State, and does not cross the border, yet if it forms a link or connection with some through line engaged in carrying goods from one State to another it is engaged in interstate commerce in so far as it receives commerce or a commodity from outside of the State into the State, or carries a commodity from inside of the State and delivers it to a carrier to be carried outside into another State. In other words, the above decisions settle the question that interstate commerce does not stop at the State line, but crosses into the interior, and is interstate commerce until it arrives at destination.

Not only do the above authorities define fully the term transportation, but in section I of the act to regulate commerce, approved February 4th, 1887, 24th Statutes at Large, 379, and as amended by the act of March 2d, 1889, 26th Statutes at Large, 743, the term "transportation" is defined to mean "all instrumentalities of shipment or carriage," so that whether the carriage be upon a boat on a navigable river, upon a canal or upon a railroad or other instrumentalities of shipment, transportation or carriage, it is none the less transportation and a subject of regulation by Congress provided it goes from one State into another.

Then the cattle shipment complained of in this case was purely an act of interstate commerce; it was an act o interstate commerce until the cattle were unloaded from

the cars at the destination thereof, to wit, the station of Hartford, Kansas.

The case of Bennett *v.* American Express Company, 83 Maine, 236, decided by the Supreme Court of Maine, was for the value of property which had been delivered to the American Express Company in the State of Maine for transportation to a point outside of the State. The transporting of the property out of the State was a violation of the police regulations of the State against killing and shipping game. The property was taken from the express company by the game warden in the State of Maine. The court held that the fact that the property was taken from the express company by the game warden was no defense; that he was a trespasser; that he had no right to take it; that as soon as the property was delivered to the express company it had begun to move as an article of interstate commerce and was subject only to the regulations of Congress, and was not subject to the police regulations of the State. We quote a part of the language of the court: —

> "This property was lawfully the property of the plaintiff. It was delivered to and accepted by the defendant company for transportation to a point beyond the limits of this State. Their liability as common carriers held them to a strict fulfillment of their obligation in relation to the property in their charge. That obligation was not merely to transport the property in this State, but to a point outside of its limits in another State. It had lawfully commenced to move as an article of commerce from one State to another. *From that moment it became the subject of interstate commerce, and, as such, was subject only to national regulation, and not to the police power of the State.* The same is unquestionably true in relation to whatever agency or instrumentality may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale, or exchange, under the commerce clause of the constitution of the United States.

The transportation of the subject of interstate commerce, where it is such as may lawfully be purchased, sold or exchanged, is without doubt a constituent of commerce itself, and is protected by and subject only to the regulation of Congress."

If the Texas cattle were articles of interstate commerce from the moment they were delivered to the carrier, as decided by the Supreme Court of Maine, they would continue to be articles of interstate commerce until they were delivered by the carrier at the destination, and, as such articles of interstate commerce, subject only to the regulations of Congress and not to the police power of the State of Kansas. From the moment they were delivered to the carrier at Midland, Texas, until they were unloaded from the cars of the carrier at Hartford, Kansas, and during that period of time, the whole power of the Federal government is pledged to protect and shield that property from State interference.

It is now settled, that any means by which interstate commerce is carried is interstate commerce itself. We call attention to the decision of Justice Miller on the Circuit in the case of the Clinton Bridge, 1st Woolworth, page 150, and quote a portion of his opinion, from pages 160, 161: —

"Another means of transportation, equal in importance to the steamboat, has also come into existence since the constitution was adopted. By it, merchandise is transported across States and kingdoms in the same vehicle in which it started. *The railroad now shares with the steamboat the monopoly of the carrying trade.* The one has, with great benefit, been subjected to the control of salutary congressional legislation. Is there any reason why the other should not be? However this question may be answered in regard to that commerce which is conducted wholly within the limits of a State, and which is therefore neither foreign commerce, nor commerce among the States, it seems to me

that when these roads become parts of the great highways of our Union, acting an important part in a commerce which embraces many States, and destined, as some of those roads are, to become the channels through which the nations of Europe and Asia shall interchange their commodities, there can be no reason to doubt that to regulate them is to regulate commerce both with foreign nations and among States, and that to refuse to do this is a refusal to discharge one of the most important duties of the Federal government. *As already intimated, the shackles with which the different States fettered commerce in their selfish efforts to benefit themselves at the expense of their confederates, was one of the main causes which led to the formation of our present constitution. The wonderful growth of that commerce since it has been placed exclusively under the control of the Federal government, has justified the wisdom of our fathers.*"

Interstate Transportation is Interstate Commerce and is Regulated Exclusively by Congress.

First, what is regulation? Referring again to the case of Gibbons *v.* Ogden, 9th Wheaton, Justice Marshall says: "*To regulate commerce is to prescribe the rule by which commerce is to be governed.*" Then, if it is the exclusive duty of Congress to regulate interstate commerce, we find that Congress alone possesses the power to prescribe the rules by which interstate commerce is to be governed. In 1866 Congress passed an act entitled "An act to facilitate commercial, postal and military communication among the States," fourteenth Statutes at Large, page 66, see Laws of Congress, *supra*, p. 7.

It seems that Congress by this act has assumed entire control and jurisdiction over every railroad in the United States and prescribed the necessary rules for the transportation of freight and passengers, as well as government

supplies, from one State to another, and, having acted, it is no longer a subject for State regulation or interference.

This act should also be considered in connection with the act subsequently passed on February 4th, 1887, as amended by the act of March 2nd, 1889, known as the interstate commerce law.

In Cooley *v.* Board of Wardens, *supra*, it is decided with reference to the exclusive power of Congress to regulate interstate commerce:—

> "Whatever subjects of this power are in their nature national or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

And in the acts of Congress referred to, Congress has legislated, and upon that subject such legislation is exclusive.

The Passenger cases, 7th Howard, 283;
Henderson *v.* Wickham, and
Commissioner of Emigration *v.* North German Lloyd, 92 U. S., page 259.

If Congress had not acted, then it would be a declaration that transportation of passengers and freight from one State to another should be free and untrammeled. In this connection, we call attention to a decision rendered by Chief Justice Field on the Circuit bench in case of Pacific Coast Steamship Co. *v.* Board of Railroad Com'rs, 18th Federal Reporter, page 10, from which we quote as follows:—

> "It was at one time a subject of much discussion and some disagreement among judges whether the

power conferred upon Congress to regulate commerce is exclusive in its character, or concurrent with that of the States. By recent decisions this question has been put at rest. *When the subject upon which Congress can act under this power is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, then the power is in its nature exclusive;* but when the subject upon which the power is to act is local in its operation, then the power of the State is so far concurrent that its action is permissible until Congress interferes and takes control of the subject. *Of the former class, is all that portion of commerce with foreign countries and among the States which consists in the carriage of persons and the transportation, purchase, sale, and exchange of commodities. From necessity, there can be but one rule in such cases for all the States; and the only power competent to prescribe a uniform rule is one which can act for the whole country. Its non-action in such cases is, therefore, equivalent to a declaration that such commerce shall be free from State interference.*"

See also opinion of Justice Field in the case of Mobile County *v.* Kimball, 102 U. S., page 691, as follows:—

"The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. *Of the former class may be mentioned all that portion of commerce with foreign countries or between the States, which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulation, and that Congress alone can prescribe.* Its non-action in such cases with respect to any particular commodity or mode of transportation is

a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. *There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States.* And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation."

Also in the case of Hall *v.* DeCuir, 95 U. S. 485, Chief Justice Waite said in speaking on this question of the control of interstate commerce, and the constant attempt of the States to infringe upon the exclusive domain of Congress:—

"*We think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress.* * * * If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interest of others. *Nay, more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without.* On one side of a river or its tributaries he might be required to observe one set of rules, and on the other, another. Commerce cannot flourish in the midst of such embarrassments."

The same question was more recently passed upon in the case of Bowman *v.* C. & N. W. R. R. Co., 125 U. S., page 507, where the Court says: —

"But where the subject is national in its character,

and admits and requires uniformity of regulation, affecting alike all the States, *such as transportation between the States, including transportation of goods from one State to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.* Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the State shall be unrestricted."

In the case of Hardy *v.* A. T. & S. F. Ry. Co., 32 Kansas, 698, Chief Justice Horton, speaking for the Court, decides in perfect harmony with the decisions of this Court upon this question, and we quote from this opinion as follows:—

"From these authorities and the cases therein cited, we think it is conclusively settled that the portion of either interstate or foreign commerce which consists in transit or traffic, including *transportation in all forms, by land or by water*, and the purchase, sale or exchange of goods, is national, and susceptible of a uniform plan of regulation, and it is therefore under the exclusive control of Congress. Even if Congress had not seen fit to prescribe any specific rules to govern interstate commerce, that does not affect the question. *Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled.*"

THE POWER OF CONGRESS TO REGULATE MAY EXTEND TO THE MOST MINUTE DIRECTIONS. There seems to be no limitation to the power of Congress over this subject. It is given to Congress exclusively by paragraph 3 of section 8 of article 1 of the Constitution of the United States and we have already seen from the authorities above cited that it

does not stop at the boundary of States; that it extends into and over a State, and, as stated before, to the most minute directions. Judge Cooley in his work on Constitutional Limitations, 3d edition, at page 586, says:—

> "The line of distinction between that which constitutes an interference with commerce, and that which is a mere police regulation, is sometimes exceedingly dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. *It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and that to whatever extent ground shall be covered by those directions, the exercise of State power is excluded. Congress may establish police regulations, as well as the States; confining their operation to the subjects over which it is given control by the constitution.*"

The doctrine announced by Judge Cooley excludes the States from enacting any laws, whether in the nature of police regulations or otherwise, that infringe upon the domain of Congress with regard to interstate commerce. *That Congress has the power to establish quarantine regulations is as true and as well settled as any other power which Congress assumes to exercise, and with reference to all of the commodities that are transported from one State to another, it is within the legitimate exercise of the power of Congress to establish quarantine or police regulations affecting the same.*

Judge Story, in his great work on the Constitution, in speaking of the power of Congress and to what extent and for what objects and purposes the power to regulate com-

merce may be constitutionally applied, says in section 1075: —

> "And first among the States. It is not doubted, that it extends to the regulation of navigation, and to the coasting trade and fisheries, within, as well as without any State, wherever it is connected with the commerce or intercourse with any other State, or within foreign nations. * * * It extends to the regulation and government of seamen on board of American ships; and to conferring privileges upon ships built and owned in the United States in domestic, as well as foreign trade. *It extends to quarantine laws*, and pilotage laws, and wrecks of the sea. It extends as well to the navigation of vessels engaged in carrying passengers, and whether steam vessels or of any other description, as to the navigation of vessels engaged in traffic and general coasting business. It extends to the laying of embargoes, as well on domestic, as on foreign voyages. It extends to the construction of light-houses, the placing of buoys and beacons, the removal of obstructions to navigation in creeks, rivers, sounds and bays, and the establishment of securities to navigation against the inroads of the ocean. (It includes the power to declare by legislative enactment whether a certain bridge is or is not an obstruction to navigation.) It extends also to the designation of particular port or ports of entry and delivery for the purposes of foreign commerce. These powers have been actually exerted by the national government under a system of laws, many of which commenced with the early establishment of the constitution; and they have continued unquestioned unto our day, if not to the utmost range of their reach, at least to that of their ordinary application."

It necessarily follows that if a State police regulation in any manner interferes with or encroaches upon the ground covered by Congress in the exercise of its power to regulate interstate commerce, it must give way because the power of Congress is supreme and exclusive.

In one of the more recent cases, 8 Leisy *v.* Hardin, *supra*, this question is referred to by Justice Fuller as follows:—

> "The power vested in Congress 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes,' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution. *It is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered.*"

The power, then, is complete and extends to every phase of the question, and is as extensive as the necessities may require. And should it become necessary to exercise police power over the subject of interstate commerce, it is just as much within the power of Congress to pass a law having the effect of a police regulation or a quarantine regulation as it is for Congress to pass any other law regulating the subject of interstate commerce; and while it may be said that the police power is vested in the States, yet where the subject is national in its character, and requires and admits of but one uniform system of regulation, then it is one over which Congress has the exclusive power; then the police power over that subject is vested in Congress as much as the power to regulate it in any other way. This is implied from the right given Congress exclusively to regulate commerce among the States. Justice Story in his work upon the Constitution, says in section 1292:—

> "While the principles of the constitution should be preserved with a most guarded caution, and a most sacred regard to the rights of the States, it is at once

the dictate of wisdom and enlightened patriotism to avoid that narrowness of interpretation, which would dry up all its vital powers, or compel the government (as was done under the confederation) to break down all constitutional barriers, and trust for its vindication to the people, upon the dangerous political maxim, that the safety of the people is the supreme law; a maxim which might be used to justify the appointment of a dictator, or any other usurpation."

Mr. Tiedeman, in his Limitations of Police Power, page 604, says:—

"The so-called 'strict constructionists' have maintained that the United States can exercise no power but what is *expressly* granted by the constitution. But this rule was at times applied so rigidly by the party in opposition, whenever it was desirable to prevent the enactment of an obnoxious law, that the right was denied to the United States to exercise even those powers which, although not expressly delegated, were so necessary to the effectuation of the express powers, that it cannot be supposed that the framers of the constitution did not intend to grant them. In numerous instances, the question of constitutional construction has been brought for settlement before the Supreme Court of the United States; and it is now firmly settled, that the Federal government can exercise, not only the powers which are expressly granted, but also those powers, the grant of which can be fairly implied from the necessity of assuming them, in order to give effect to the express grant of powers."

Again, Mr. Tiedeman in his work on the Limitations of Police Power, at page 614, after referring to paragraph 3 of section 8, article 1 of the constitution of the United States, says:—

"In conformity with this constitutional provision it has been held that whenever Congress exercises this

form of regulation over foreign and interstate commerce, State regulations must invariably give way, and the regulations by Congress of commerce may descend to the minutest details, providing regulations of the most local character in the exercise of this power."

From the above authorities it would seem to be fundamental that the power of Congress is exclusive over the subject of interstate commerce; that such power and its exclusiveness extends to the article as well as to the instrumentalities forming interstate commerce. In the case at bar it is live stock,— the transportation of live stock from one State to another,— and the power of Congress over it extends not only to all the regulations affecting the carriage of the live stock, but to the instrumentalities by which it was transported — the railroad; that there is no limitation to such power; that it extends to the most minute detail and can regulate or provide regulations of the most local character, and when Congress does act upon this subject, the State laws and regulations must give way as to all the ground covered by the regulations provided by Congress. We see by the above authorities that Congress can pass a uniform system of quarantine laws and provide all the regulations for carrying them into effect, and when Congress does establish a national system of quarantine, then all State laws, rules and regulations upon the question must give way to the exclusive authority and power of Congress over the subject.

II.

By the Passage of the Act of May 29th, 1884, entitled "An Act for the Establishment of a Bureau of Animal "Industry, to Prevent the Exportation of Diseased "Cattle, and to Provide Means for the Suppression and

"Extirpation of Pleuro-Pneumonia and Other Conta-"gious Diseases Among Domestic Animals," Congress provided a National System of Quarantine and also Delegated to the Department of Agriculture the Power to Establish all Proper Rules and Regulations for the Transportation of Domestic Animals.

It will be observed from reading the title to this act, that it is not made applicable to any particular State or to any particular Territory, but is national in its application, and the object of the act is to ascertain in what particular localities contagious diseases exist and to provide a national and uniform system of quarantine for the purpose of preventing the spread of such diseases (see *supra*, pp. 2–6, where act is printed).

By section 1 of the act, the Commissioner of Agriculture is authorized to organize in his department a bureau of animal industry, to appoint a chief thereof who shall be a competent veterinary surgeon, and whose duty it shall be to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also inquire into and report the causes of contagious, infectious and communicable diseases among them and the means for the prevention and cure of the same, and to collect such information on these subjects as shall be valuable to the agricultural and commercial interests of the country. The Commissioner of Agriculture has complied with this act. He has appointed a chief of the bureau of animal industry who has performed his duty as prescribed in the act and determined the causes of contagious, infectious and communicable diseases among domestic animals, and that he has determined the means for the prevention and cure of the same, and that he has faithfully collected such information on these subjects as will be valuable to the agricultural and commercial in-

terests of the country. But the power of the act does not stop there. By section 2 the Commissioner is authorized to appoint two competent agents who shall be practical stock raisers, or experienced business men, familiar with questions pertaining to commercial transactions in live stock, whose duty it shall be under the instructions from the Commissioner of Agriculture to examine and report upon the best methods of treating, transporting and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to provide against the spread of other dangerous, infectious and communicable diseases. Under section 1 the expert veterinary surgeon is to investigate and determine the cause of contagious and infectious diseases among domestic animals. He is also to determine the means by which the spread of such diseases can be prevented. The agents referred to in section 2 are to examine and report upon the best methods of treating, transporting and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to provide against the spread of other dangerous, infectious and communicable diseases.

It is apparent that these agents and the veterinary, under the instructions of the Commissioner of Agriculture, are to act together; and that so far as sections 1 and 2 are concerned they are simply to determine the causes of diseases, the means of preventing the spread of the diseases, the best methods of treating, transporting and caring for animals, and to provide against the spread of other contagious, infectious and communicable diseases. When all this information is laid before the commissioner, it is then made his duty by section 3 of the act to provide such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive

authority of each State and Territory, and invite said authorities to co-operate in the execution and enforcement of the act.

From this it is practically clear that the rules and regulations prepared by the Commissioner of Agriculture and served upon the executive of the States or Territories becomes a part of the act or a part of the law, and that his suggestions, consisting of the rules and regulations for the suppression of contagious diseases, are just as effective as though passed by an act of Congress; because full authority is given, under these three sections of the act, for the commissioner to adopt any rules or regulations which he may deem necessary for the purposes of preventing the spread of contagious diseases among domestic animals. Sections 4 and 5 of the act provide for certain duties to be performed by the Commissioner of Agriculture relating to the exportation from the United States to any foreign country of any live stock affected with any contagious, infectious or communicable diseases, and especially the disease known as pleuro-pneumonia.

Section 6 of the act in terms forbids the transportation of diseased animals. It prohibits the railroad companies from transporting diseased animals. And it will probably be claimed by the other side that under the terms of Sec. 6, it makes no difference whether the railroad company was advised of the facts as to the capability of the animals transported by it to communicate diseases; that if such fact could be ascertained by the company in any manner, it is the company's duty to do so, and that it is no defense that the company was ignorant of the dangerous character of the cattle. By reading Section 6, it will be noticed that the owner of the cattle is forbidden to knowingly deliver to the railroad companies any cattle capable of communicating a contagious disease. Section 6 must be construed together with all the other sections of the act,

keeping in view the object to be obtained by the enforcement thereof.

It must be admitted that this section shall receive such construction as was intended by Congress; but it is improbable that Congress intended to only make the owner of the cattle — the man who is best acquainted with their condition as to health or otherwise — liable when he knowingly delivers cattle to a railroad company for carriage that are capable of communicating a disease, and make the carrier liable for carrying them whether it knew the fact or not. Such a construction of Section 6 would be unreasonable, and if it is to prevail then we say that the entire law upon the subject of carriers must be changed and the carrier must have the right to refuse shipments of cattle regardless of the fact whether they are diseased or not, or that the carrier shall be permitted to refuse except upon a guarantee of protection, so that we say the construction of this section contended for by the court below and by the other side in this case, is not reasonable, was not intended by Congress and is not in harmony with the other provisions of the act. We might admit, for the purposes of argument, that the railroad company would be liable under this section if it knowingly accepted cattle capable of communicating a contagious disease and knowingly transported them and negligently permitted them to communicate the disease to other stock while in its possession or under its control though the statute imposes no civil liability in any express terms. But a most conclusive answer to the contention of the other side is that whatever construction may be given to section 6 with reference to this matter, we have not been sued for a violation of section 6, but have been sued only for a violation of the State law. If claimants were to derive any benefit from the terms of this section they should have based their action upon it, and not having done so it is not a question material in this case

how section 6 shall be construed. It is common law that before a corporation can be held for damages under such circumstances it must be shown that it knowingly transported the diseased animals and that the disease was communicated while in their control. The power given Congress to regulate this subject gives it the power to declare a penalty and all necessary penalties for an infraction of either the law or the rules promulgated by the Department of Agriculture; and nowhere in the act and nowhere in the rules promulgated by the Secretary of the Department of Agriculture can the carrier be made liable either civilly or criminally except as knowingly violating either the laws or the rules of the Secretary; and such violation could only occur where it had knowingly transported diseased cattle or knowingly transported cattle capable of communicating disease which had communicated the disease which the carrier had or ought to have had restraining power over them.

In order that the carriers may be informed as to the localities in which the disease exists and thereby avoid incurring any liability under the act of Congress, the commissioner is authorized by section 7, to notify, in writing, the officials or agents of railroad, steamboat or other transportation companies doing business in or through any infected locality; also public notice thereof by publication in such newspapers as he may select of the existence of said contagion. Evidently his information is the result of the compliance by the veterinary surgeon and the two assistants provided by sections one and two of the act. From the information gathered by these parties he is enabled to notify the railroad companies and to give public notice of the localities where any diseases exist. The receiving for transportation of cattle from inside of the infected area as established by the notice which he serves upon the railroad companies and by his public notice, might be taken as prohibited by the act

but when the cattle are from outside of the infected area there is no prohibition, and absolutely nothing to warn the carrier of the dangerous character of the cattle. He has the right to rely upon the result obtained by the experience of the Bureau of Animal Industry, and to rely absolutely upon the information given by the notice served upon him of the localities in which the disease exists, and the carrier is not bound to look elsewhere for the existence of that disease. By the above act Congress has taken charge of the entire question and assumed the responsibility. The act and rules and regulations of the Department of Agriculture must be construed together, and they must be construed as an intimation on the part of Congress to absolutely control this question and relieve States from any responsibility therefor. It is both a quarantine and a police regulation, and is enacted with a view of protecting interstate commerce from State interference upon the pretext that the State is exercising quarantine and police power. We call the court's attention to an editorial which appeared in the Central Law Journal of June 12, 1885, upon this question. The article was suggested by the fact that the Governor of Illinois, upon information officially reported to him by the State veterinary surgeon of that State that Texas fever existed in Missouri, issued his proclamation prohibiting all railroad and transportation companies from bringing cattle from the State of Missouri into the State of Illinois unless before shipping the same from the State of Missouri, they shall receive from duly recognized veterinary authority of that State a certificate showing that the cattle shipped or transported are in a healthy condition and have not been exposed to such disease for a period of one hundred (100) days next preceding the removal of such cattle from such State. This action on the part of the Governor of Illinois was resented by the Governor of Missouri, and the Gov-

ernor of Illinois was urged to rescind his action, which, however, he refused to do. The Central Law Journal, after setting out the above facts and commenting upon them, makes this suggestion: —

> "This circumstance is fruitful of suggestions. Many States have laws under which their authorities may establish quarantine regulations against other States, both in respect of persons and animals. The establishing of such regulations may be the result of fear superinduced by false or erroneous reports, and intensified by local jealousy. They may be wholly unnecessary. In nearly every case they are believed to be ineffectual. But they have the effect of greatly impeding commerce and of injuring, not only the citizens of the State against which they are directed, but also the citizens of other States. The lesson which this teaches is, that the subject of interstate commerce has become altogether too large a subject to be dealt with by the States. The same may be said of regulations designed to prevent the spread of contagious diseases, whether among men or animals. The whole subject ought to be committed to the exclusive control of the department of the interior, with ample powers, and with ample means for the execution of such powers."

In the above article the editor of the journal makes an excellent suggestion, but seems to have overlooked the fact that only shortly prior to the publication of his editorial, Congress had done just what he herein suggested by passing the act of May 29th, 1884; but the act had not yet become operative all over the United States, because of the fact that it took time to make the necessary experiments and provide the rules and regulations necessary under the act.

That Congress intended the act of May 29th, 1884, to cover every feature of the transportation of live stock, diseased and healthy, cannot be doubted for a moment. It

was intended as an authority for proper quarantine rules and regulations; it was intended as authority for proper police regulations to take entire control of the subject and ascertain not only the place where these diseases exist, but to quarantine such localities, and to prescribe proper rules for the transportation of any and all live stock from one section of country to another, with proper and appropriate penalties for an infraction and violation thereof.

Mr. Prentice, in his recent work on Police Power, says on page 13:—

> "The United States has extended its police legislation in a number of instances, as in the law against trusts and monopolies entitled 'An act to protect trade and commerce against unlawful restraints and monopolies' and in the acts in regard to lotteries, refusing the facilities of the mails to the distribution of circulars and advertisements deemed injurious to the public morals. *In interstate commerce the government exercises this inherent power for protection through the Department of Agriculture and the Bureau of Animal Industry. Agents and methods are employed to examine, quarantine and destroy the animals and to extirpate pleuro-pneumonia. In such efforts the aid of the States and Territories is invited, but the general government proceeds to original action.* Further acts regulate the safe and humane treatment of animals in transportation."

The bitter experience of the Western States has taught the public that the only way in which this matter could be controlled was, as is stated before, by one full, complete and comprehensive system of national quarantine, regulating the shipment and transportation of domestic animals, and providing for the investigation, suppression and extirpation of all contagious, infectious and communicable diseases among them.

It was contended below that the act of the legislature of Kansas, approved March 26th, 1884 (see Sec. 6826, *supra*, p. 15), was passed before the passage of the law of May 29th, 1884. It is true that it was approved prior to the passage of the act of May 29th, 1884, but at the time the act of the Kansas legislature, approved March 26th, 1884, was passed the law creating the Bureau of Animal Industry had already passed Congress and was then pending in the Senate, and that there was very little doubt that it would pass. The history of the act of May 29th, 1884, is as follows: —

House Bill No. 3967, which ultimately became the law in question, was introduced by Mr. Hatch of Missouri, on January 26th, 1884, as a substitute for House Bill No. 876, which had been previously introduced (see Congressional Record, 48th Cong., 1st Session, part 1, page 682). While this bill was pending before Congress, there was presented and read in Congress a resolution of the Kansas State Board of Agriculture, held in Topeka, Kansas, January 10th, 1884, which resolution reads as follows:

> "Resolved, That our members in Congress be, and they are hereby respectfully *requested to favor such legislation as may be necessary to determine and clearly define the Territory of the United States now infected with the disease among cattle known as pleuro-pneumonia*, and to circumscribe, to strike out, this much dreaded disease in this country by the purchase if necessary, at the expense of the Government, and slaughter of all animals infected with the disease, or known to have been exposed thereto."

(See Congressional Record, 48 Cong., 1st Ses., part 1, page 900.)

The bill passed the House of Representatives, February

28th, 1884 (see Congressional Record, 48 Congress, 1st Ses., part 2, page 1465), and passed the Senate April 29, 1884 (see page 3585), and was approved by the President May 29th following.

This warrants us in saying that the act of the Kansas legislature, passed March 26, 1884, was in view of the probable passage by Congress of the act of May 29, 1884.

The stock interests all over the country were watching the progress of this bill in Congress, because in Congress alone was there any hope of effectually suppressing contagious diseases among domestic animals in the United States. Until Congress assumed jurisdiction of this question it was not known where the disease existed. States were quarreling among themselves — accusing each other, and by passing quarantine laws and regulations seriously embarrassing and injuring the material and business interests of each other. And it never became known to what particular district or what particular territory the disease of Texas, splenic, or Spanish fever was confined until the experiments of the chief of the Bureau of Animal Industry, conducted under the authority of the act of May 29, 1884, resulted in disclosing in a satisfactory manner that information to the public, and relieved the States of the embarrassment to which timidity, apprehensions, jealousies, etc., had driven them.

The Laws of Kansas for the Protection of Domestic Animals are in Effect a Regulation of Interstate Commerce and Conflict with the Act of Congress and the Rules and Regulations of the Department of Agriculture Promulgated Thereunder.

Section 6775, *supra*, pp. 13 & 14, declares that the fact hat the cattle came from south of the thirty-seventh parallel

of north latitude (which is the south line of Kansas) shall be taken as *prima facie* evidence that such cattle were, between the first day of February and the first day of December of the year in which the offense was committed, capable of communicating and liable to impart Texas splenic or Spanish fever.

Section 6775 also provides for the punishment of the party who shall bring the cattle in, and also provides that in any action, whether it be a criminal action or a civil action to recover damages, proof that the cattle were brought into this State from south of the thirty-seventh parallel of north latitude (south line of Kansas) shall be taken as *prima facie* evidence that such cattle were capable of communicating and liable to impart Texas splenic or Spanish fever within the meaning of the act; but the court will observe that the words "ship or transport" are not used in this section, and consequently it is a strained construction to make its terms cover the act of the railroad company in bringing the cattle into the State.

The section of the Kansas statute under which the courts below held the defendant liable is section 6774, *supra*, pp. 13. It provides "that any person or persons who shall drive, ship or transport," or cause to be "shipped or transported" into or through any county, Texas cattle, shall be liable for damages sustained by communication of the Texas fever. Particular attention is called to the words "ship or transport," for the reason that nowhere in the statute is the carrier of live stock mentioned, unless it can be held that the words "ship or transport" include the carrier as well as the owner. The statute apparently upon its face is directed against the owner of the cattle, or his immediate agents who have the cattle in charge; and nowhere in the statute is there any pretense that there is any attempt to prohibit or connect the carrier with the unlawful handling

of the cattle, unless the words "ship or transport" can be so interpreted as to include the carrier. This interpretation, manifestly erroneous, has received the sanction of the Supreme Court of Kansas in this case.

Section 6760, *supra*, pp. 10. Simply prohibits the driving into any county or part thereof in this State, or upon the highway, range, common or pasture within this State, any cattle capable of communicating or liable to impart the disease known as Texas splenic or Spanish fever. Section 6775 by its terms provides that upon the trial of any person charged with the violation of any of the provisions of this law, and in the trial of any civil action brought to recover damages for the communication of Texas splenic or Spanish fever, the fact that the cattle which communicated said disease were brought into the State from south of the thirty-seventh parallel of north latitude (south line of Kansas) shall be taken as *prima facie* evidence that such cattle were, between the first day of February and the first day of December of the year in which the offense was committed, capable of communicating and liable to impart the said disease within the meaning of this act, and that the owner or owners, or person in charge of such cattle, had full knowledge or notice thereof. By the opinion handed down in this case, this statute is construed to mean that the carrier had knowledge and notice of the dangerous character of the cattle because they came from south of the south line of the State of Kansas.

Both sections 6774 and 6775 above quoted undoubtedly, as construed by the opinion of the Supreme Court of Kansas in this case, are intended to operate as a restraint upon the shipment of cattle from south of the south line of Kansas, not upon the owner alone, but also upon the carrier as well, and are therefore an attempt on the part of the State to regulate, to interfere with, and restrain interstate shipments of cattle. In fact the operation of both sections 6774 and

6775, as construed by the Kansas Supreme Court in this case, is confined entirely to shipments from south of the south line of Kansas between the first day of February and the first day of December during any year, and that too, regardless of any Federal laws, rules or regulations upon the subject. In fact, in the opinion in this case, in which the above sections of the Kansas statute are construed (erroneously as we claim), the authority of Congress and of the Secretary of the Department of Agriculture under the act of Congress creating the department, to make any regulations which would have the effect to abrogate in any degree the statute of this State, is denied. See transcript, 295, where the SupremeCourt says:—

> "They (referring to the railroad company) brought the infected cattle into the State, to the station of Hartford, fully cognizant of the purpose of Hosier Brothers and Brogans, and did knowingly aid them in carrying out that purpose. They are responsible for all the direct consequences that have ensued therefrom. They acted not only in direct violation of the statutes, which have been found by long and bitter experience to be so essential to the protection of the domestic cattle of the State, but they acted in direct violation of Section 6 of the act of Congress before quoted. *The regulations established by the Secretary of Agriculture contain nothing tending to exempt the company from liability, and the Secretary had no power under the act of Congress to make any regulations which would have the effect to abrogate in any degree the statutes of this State.*"

It is not contended that the rules established by the Secretary of the Department of Agriculture contain anything in express terms exempting the railroad company from liability for an act of negligence, but it is contended that the Secretary of the Department of Agriculture has the power under the act creating

the Bureau of Animal Industry to establish all rules and regulations for the transportation of Texas cattle between the States, and that the railroad company as a carrier of domestic animals has a right to rely upon the rules and regulations of the Department of Agriculture, and if it complies with such rules and regulations, it is exempt from all liability for the act of bringing the cattle into the State, nor can any burden be imposed upon it for its agency in bringing the cattle into the State. Nor can it be charged with violating any State law upon the subject, for the reason that any State law to be valid must be in absolute harmony not only with the act creating the Bureau of Animal Industry, but with all rules and regulations promulgated by the Secretary of the Department of Agriculture thereunder; and any State law that in terms or by implication conflicts with either said act or said rules and regulations must give way and yield to the superior power of Congress.

Sections 6774 and 6775 are different in their terms and conflict with the rules and regulations established by the Secretary of the Department of Agriculture. Under the rules and regulations established by the Secretary of the Department of Agriculture, he is required under section 7, *supra*, p. 5, to serve notice upon the management of railroad companies who do business through an infected district, of the existence of this contagious, infectious or communicable disease, and then any railroad company that shall take any cattle from inside of that territory described in the Secretary's notice, which shall be capable of communicating this disease, shall be liable, etc. The terms of section 7, which are ignored by the Supreme Court of Kansas, are that the railroad company can only be made liable when its officers knew of the dangerous character of the cattle, and knowingly violate section 6. Section 7 is ignored by the Supreme Court and section 6 is wrongfully construed to mean that the carrier takes these cattle at its peril, and

is erroneously construed to be in harmony with the statutes of the State of Kansas which forbid the bringing in of cattle from south of the south line of the State between February 1st and December 1st of each year.

We find upon comparing the circular of 1892 issued by the Honorable Jeremiah M. Rusk, Secretary of the Department of Agriculture (which was the year these cattle were brought into the State of Kansas), with the Kansas statutes, that there is a material difference; that under the terms of the circular with the accompanying map the area in the United States in which there are infected cattle, or cattle capable of communicating infectious, contagious or communicable diseases, is different from that prescribed by the Kansas statute. The Texas cattle in question came from north and west of the government quarantine line and were, under the rules and regulations of the Department of Agriculture, from a locality where cattle were supposed to be healthy and incapable of communicating the disease known as Texas splenic or Spanish fever, and had the right to remove by rail to Kansas. Yet they were prohibited by the Kansas statutes from entering the State of Kansas between the first day of February and the first day of December of each year, and because they were from south of the south line of Kansas was made *prima facie* evidence of the fact that they were capable of communicating this disease, notwithstanding the experiments of the Department of Agriculture had demonstrated the contrary.

Congress undertook, by virtue of the act of May 29th, 1884, to provide a general system of quarantine and regulations for the purpose of the suppression and extirpation of contagious diseases among domestic animals, and it confided the details of that system entirely to the Secretary of the Department of Agriculture. This it could legally do, as was decided in the case of Morgan *v.* Louisiana, 117 U. S. 455, wherein the court said: —

"It may be conceded that whenever Congress shall "undertake to provide for the commercial cities of "the United States a general system of quarantine, or "shall confide the execution of the details of such a "system to a national board of health, or to local "boards as may be found expedient, all State laws on "the subject will be abrogated, at least so far as they "are inconsistent."

In the light of this opinion, all State laws of Kansas in conflict with the act creating the Bureau of Animal Industry, or in conflict with the rules and regulations established and promulgated by the Secretary of the Department of Agriculture thereunder, are abrogated in so far as they are inconsistent. If the Secretary says that the disease exists within a locality and draws his imaginary line around that locality, it is not within the power of any State legislature or any quarantine board, or any State Supreme Court, or the executive of any State, to say that it exists elsewhere and to prescribe additional rules and regulations than those prescribed by the secretary of the Department of Agriculture. The effect of the secretary's rules is to say that outside of, or in this case north and west of the quarantine line established by him, the shipment and transportation of all domestic animals shall be free and untrammeled, and it is not within the power of the State legislature, nor is it within the power of a quarantine board, or any Supreme Court or the executive of any State, to impose a burden either directly or indirectly upon the transportation of domestic animals between the States under the secretary's rules and regulations that transportation of the same shall be free and untrammeled. Congress, through the secretary of the Department of Agriculture, says that the transportation of domestic animals from north and west of its quarantine line shall be free and untrammeled; the Supreme Court of Kansas says that the legislature

of the State can extend that line and include territory therein and impose restrictions upon the transportation of animals not imposed by the act of Congress of May 29th, 1884, or the rules and regulations of the Department of Agriculture promulgated thereunder. Is this leaving the transportation of domestic animals from points north and west of the government quarantine line free and untrammeled? Is the declaration of Congress made through the Secretary of the Department of Agriculture that said traffic shall be free and untrammeled, to be lightly ignored, abrogated and trampled under foot by the legislature or Supreme Court of the State?

Not only is the Kansas law construed by the court in conflict with the act of May 29th, 1884, and the rules and regulations prescribed thereunder, but the decision of the Supreme Court goes even farther than it is warranted by the statute in going. By the terms of the decision, the power of the secretary under the act of Congress is absolutely denied, and the proposition is advanced that any law of Congress attempting to regulate interstate commerce which shall conflict with the laws of Kansas enacted under its police power, that such law of Congress and the rules and regulations of the Secretary of the Department of Agriculture promulgated thereunder, must give way.

And the Supreme Court of Kansas continues and says:—

> "The conclusions we have reached render it unnecessary to consider how far Congress by acts passed for the regulation of interstate commerce could go in curtailing the power of the legislature of this State to protect its citizens from the introduction of infectious and contagious diseases dangerous to their life or destructive to their property."

In the above conclusion the Court overlooked the fact

that the question is not how far the Congress can go but how far can the State go in restricting interstate commerce or imposing a burden thereon where Congress says it shall be free and untrammeled. The above declaration assumes the right in the Supreme Court of Kansas to determine just how far Congress may go in the exercise of its power to regulate interstate commerce.

It would seem to be well settled from the authorities which we have cited that the power of Congress over the question of interstate commerce and, as transportation from one State to another is interstate commerce, the power of Congress over transportation is unlimited; just so long as Congress does not attempt to interfere with the regulation of the domestic affairs of the State, its power cannot be questioned. But the statute of Kansas, as construed by the Supreme Court in this State, goes farther than the mere regulation of the domestic affairs of the State; it is a prohibition upon the carrier against the bringing in of this class of cattle, not cattle that are known to be diseased but all cattle from south of the south line of the State, because it says that cattle from south of the south line of Kansas are capable of communicating this disease, and the fact that they are from south of the south line of Kansas shall not only be *prima facie* evidence of the fact that they are capable of communicating the disease, but shall be *prima facie* evidence of the fact that the carrier had notice of the dangerous character of the cattle. The decision of the Supreme Court of Kansas in upholding the State statute and striking down the Federal law, and denying the authority of the general government, through its Department of Agriculture to make any regulations which would have the effect to abrogate in any degree the statutes of this State, carries the doctrine of State's rights to a degree hitherto unknown to the jurisprudence of this country. It would seem from the amount of blood and

treasure spent some thirty years ago in the settlement of this question that it ought not again to be heard or to receive sanction and support, at least from the Supreme Court of Kansas.

Again, the Supreme Court of Kansas overlooked the important and controlling fact that Congress by the passage of the Act of May 29th, 1884, and the rules and regulations of the Secretary of the Department of Agriculture promulgated thereunder, curtailed interstate commerce as far as the investigation by the Secretary of the Department of Agriculture made through his Chief of the Bureau of Animal Industry thought it necessary to do so for the safety of domestic animals in the State of Kansas and elsewhere north and west of the quarantine line, and that its action with reference to this question and every phase of it has been most thorough and complete, leaving absolutely nothing for the States to do but to co-operate in the enforcement of the provisions of that act and the rules and regulations of the Secretary of the Department of Agriculture promulgated thereunder.

If the Supreme Court of Kansas means that its law is a police regulation, the opinion goes too far. Conceding the law of Kansas in regard to this matter to be a police regulation, it goes farther than a mere regulation; if it was a police regulation regulating simply the internal affairs of the State, then it would not operate upon interstate commerce, because this was interstate commerce until the cattle were unloaded from the cars and mingled with the property of the State. They were not subject to the jurisdiction of the State authority while being transported; they were then protected by the interstate commerce laws and were subject to no authority except that of the general government. This question has been settled by the repeated decisions of this Court. In this connection we call this Court's attention to the case of

Bowman *v.* C. & N. W. R. R. Co., 125 U. S. page 507,

where the Court speaks with reference to the police regulations of a State, and when a police regulation of a State takes effect and operates upon property coming into the State as the subject of interstate commerce. The Texas cattle in question were as much interstate commerce as was the property which in that case it was sought to compel the Chicago & North Western Railroad to carry. The company had refused to carry this property consisting of some four thousand barrels of beer, because it was prohibited by the laws of Iowa from carrying the property into the State; but this Court held that the fact that the law of Iowa prohibited the railroad company from carrying the property into the State was no defense to an action against the company for its refusal to receive the property, and that it was bound to receive and carry the property. The Court then said:—

> "*It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled.*"

Again, in Welton *v.* The State of Missouri, 91 U. S. 275, where the Court speaking with reference to the extent of the power of Congress and when it ceased to protect the property imported from one State into another, and also when the police regulations of the State operated upon the property, said:—

> "The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or inter-

fering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, *and to no greater burdens*. If, at any time before it has thus become incorporated into the mass of property of the State or nation, it can be subjected to any restrictions by State legislation, the object of investing the control in Congress may be entirely defeated."

And again, further on in the opinion, speaking upon the same subject, the court said:—

> "It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. *That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin.*"

Again in the case of Henderson *v.* Mayor of New York City, 92 U. S. 259, the court speaking with reference to this same subject says:—

> "But, however difficult this may be, *it is clear, from the nature of our complex form of government, that, whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States.*"

And also in the case of Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 176, the court, speaking with reference to this same power, the extent of it, and the subjects upon which it acts, says when the subject upon which it acts are "national in their character and require uniformity of "regulation, affecting alike all the States, the power of "Congress is exclusive," and when Congress fails to act

"*its non-action is a declaration that it* (*commerce*), *shall* "*remain free from burdens imposed by State legislation.*"

Applying this law to the case at bar, the police power of the State did not operate upon these cattle until after they had been unloaded from the cars at Hartford, Kansas, and had mingled with the property of the State.

In Illinois there is a law against bringing into the State any Texas or Cherokee cattle except between the first days of October and the first days of March following of each year. A second section of the act provided that it should be unlawful for any person or persons or railroad company, or other corporation or association of persons within the State, to own, or have in possession or control, any Texas or Cherokee cattle at any time, which may have been brought into the State at any time between the first days of October and the first days of March following of each year. In the case of Salzenstein *v.* Maris, 91 Ill., this law was before the court and it was held invalid. The language of the court in passing upon the validity of the law is as follows: —

> "We cannot, however, understand how the right to transport and bring into this State Texas cattle can be exercised, if the owning or possessing such cattle within the State is prohibited. The right to transport from another State into this State necessarily includes the right of possession and ownership in this State. If the latter is prohibited, the former right must fall with it. If the legislature has the constitutional right to declare that a person shall possess or own a certain kind of property within the State, which may be raised or produced in another State of the Union it logically follows that all interstate commerce in such property is both regulated by the legislature and is prohibited. We do not understand that the legislature can do indirectly that which the constitution of the United States prohibits to be done directly. Such,

however, would be the case if the theory of the plaintiff in this case was sanctioned."

The Illinois statute and the Kansas statute are substantially the same. The Illinois statute prohibited the bringing into the State of any Texas or Cherokee cattle between the first day of March and the first day of October of any year; the Kansas statute prohibits the bringing in of any cattle from south of the south line of Kansas between the first day of February and the first day of December of each year. If anything, the Kansas statute is more sweeping in its terms and more strictly prohibitive in its terms, because it reaches all classes and grades of cattle, while the Illinois statute in its operation was limited only to two classes,— Texas and Cherokee. There is substantially no difference so far as the right of the State to interfere with the transportation of cattle into the State is concerned.

It might be perfectly competent for the State to pass a proper inspection law, and we will show further on that the State has a law of that kind. It might have been perfectly competent for the State to have said to the carrier, "we desire to inspect these cattle," and if the authorities of the State deemed the cattle dangerous to other domestic animals in the State, it would have been perfectly competent for the authorities to have taken possession of the cattle at destination, to have placed them in quarantine and to have kept them there until all danger of contagion was passed. But although the State had inspectors stationed, one at Fort Worth and one at Parsons, the cattle in question passing right under the eye of these two inspectors, they seemingly did not deem the cattle dangerous; at least, they did not advise the State authorities of such fact. Is the railroad company to be held to the exercise of greater care? Is the railroad company to become a part of the police force of the State? Is the railroad company to be compelled at its

own expense, in order to avoid liability under a State law, to inspect these cattle, and that too after they had passed the State inspectors without objection, and that too when under the Federal rules and regulations no inspection is necessary? Where is the law making railroads a part of the police force of the State and making them liable for a failure to properly discharge their duties as such?

We submit that such a requirement would be adding a burden and a very heavy burden upon interstate transportation. In fact, if the doctrine announced in this case by the State court is to be sustained, there is not a railroad company running from south to north but what would have to employ its own veterinary surgeon for the purpose of investigating and ascertaining if each car load of cattle tendered it for shipment was incapable of communicating Texas splenic or Spanish fever, and its failure to do so would result in its becoming liable in case such cattle should communicate the disease. Such a requirement is an unreasonable burden upon the carrier and yet in the oral argument of this case, both in the trial court and in the Supreme Court of the State it was insisted that this was just what the railroad company should do. There is no law existing either at common law or by statutory enactment, imposing this amount of care upon carriers; and it is not within the power of a State to impose upon the carrier of interstate commerce this requirement.

Mr. Tiedeman, in his Limitations of Police Power, page 615, says:—

> "*If the business in question contains an element of danger to the public, it may be subjected to regulations designed to protect the public against injury; it may be made subject to inspection, and a license fee may be exacted in aid of its inspection laws. This is an ordinary police regulation.*"

The Kansas law is not a police regulation; it is not an inspection law; it goes further than that and covers identically the same ground covered by the act of Congress creating the Bureau of Animal Industry and the rules and regulations of the Department of Agriculture thereunder. In Missouri there was a statute which provided that "no "Texas, Mexican or Indian cattle shall be driven or other- "wise conveyed into or remain in any county in this State "between the first day of March and the first day of "November, in each year, by any person or persons what- "soever." There was another and later section of the statute which provided as follows:—

> "If any person or persons shall bring into this State any Texas, Mexican or Indian cattle in violation of the first section of this act, he or they shall be liable in all cases for all damages sustained on account of disease communicated by said cattle."

Under this law, an action for damages was brought against the Hannibal and St. Joseph R. R. Co., for bringing into the State cattle in violation of this law. The statute was held, in R. R. Co. *v.* Husen, 95 U. S. 465, to be in violation of the commerce clause of the constitution, and, in passing upon this question, this court said:—

> "It seems hardly necessary to argue at length, that, unless the statute can be justified as a legitimate exercise of the police power of the State, it is a usurpation of the power vested exclusively in Congress. It is plain regulation of interstate commerce; a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the constitution of the United States, to Congress, in the same words in which it is given over the other, and in both cases it is neces-

sarily exclusive. That the transportation of property from one State to another is a branch of interstate commerce is undeniable, and no attempt has been made in this case to deny it.

"The Missouri statute is a plain interference with such transportation; an attempted exercise over it of the highest possible power — that of destruction. It meets at the borders of the State a large and common subject of commerce, and prohibits its crossing the State line during two-thirds of each year, with a proviso, however, that such cattle may come across the line loaded upon a railroad car or steamboat, and pass through the State without being unloaded. *But even the right of steamboat owners and railroad companies to transport sach property through the State is loaded by the law with onerous liabilities because of their agency in the transportation.* The object and effect of the statute are, therefore, to obstruct interstate commerce, and to discriminate between the property of citizens of one State and that of citizens of other States. This court has heretofore said that interstate transportation of passengers is beyond the reach of a State legislature."

The statute of Missouri does not differ from the effect of the decision of the Supreme Court of Kansas in this case, except that the law of Kansas prohibits the bringing in of cattle capable of communicating Texas fever, and the law of Missouri prohibited the bringing in of Texas, Mexican or Indian cattle. In the case just cited, the cattle were of the class prohibited and were diseased cattle. Under the Kansas law in the case at bar, the cattle were only prohibited in case they were diseased; but the fact that they were from south of the south line of Kansas was taken as evidence of the fact that they were diseased. Therefore, the laws are exactly alike, because the law of Kansas makes the fact that they are from south of the south line of Kansas *prima facie* evidence of the fact that they are capable of communicating a disease, while the law of

Missouri assumed that the fact that they were Texas, Mexican or Indian cattle was evidence of the fact that they were capable of communicating a disease. One law makes the direction from which the cattle come into the State *prima facie* evidence of the fact that they are capable of communicating disease, while the other law assumed that the nativity of the cattle was evidence of the fact that they were capable of communicating disease. If anything, the Kansas law is more objectionable than was the law of Missouri.

The doctrine announced in the Husen case has been since followed by the Supreme Court of Missouri in the case of:—

Gilmore *v.* Hannibal & St. Joe R. R. Co., 67 Mo. 323.

And by other State courts:—

Adams Express Co. *v.* Board of Police, 65 Howard's Practice, 72;
Chicago & Alton R. R. Co. *v.* Ericson, 91 Ill. 613;
Salzenstein *v.* Maris, 91 Ill. 391.

As we have said before, Congress has exclusive control of this question and had a right to prescribe every rule and regulation affecting this shipment of cattle from the time they were loaded at Midland, Texas, until the time they were unloaded at Hartford, Kansas, and no State law or requirement could, under the circumstances of this case, operate upon these cattle or burden the railroad company for carrying these cattle in any manner whatever; and all State laws, whether civil or criminal, whether police regulations or otherwise, must go down before the law enacted by Congress on May 29th, 1884, and the rules and regulations of the Department of Agriculture promulgated thereunder. It may be repeating and citing cumulative author-

ities upon the question, but we call this Court's attention to the decision of

Sherlock *v.* Alling, 93 U. S., page 99,

and to quote from a portion of the decision in that case: —

> "*It is true that the commercial power conferred by the constitution is one without limitation.* It authorizes legislation with respect to all subjects of foreign and *interstate commerce, the persons engaged in it, and the instruments by which it is carried on.* And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital and other dues they shall be subjected; what rules they shall obey in passing each other; and what provision their owners shall make for the health, safety and comfort of their crews. Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details, to guard against accident and consequent loss of life.
>
> "*The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of State authority.*"

This doctrine has been upheld by the Supreme Court of Texas in case of Missouri, Kansas & Texas Railway Co. *v.* Fookes, 40 S. W. Reporter, page 858. In that case, the validity of article 4560 Rev. Statute 1895 was before the court for interpretation, the validity of the statute having been challenged. The statute substantially provided that it shall be the duty of all railroad companies and other

carriers in the State to provide for the redemption from the holder of the whole or any parts or coupons of ticket or tickets which they, or any of their duly authorized agents, may have sold and which were unused. The statute further provides a penalty for the failure of the carrier to comply with the statute by redeeming these tickets or parts of tickets that might be unused. The statute was held to be unconstitutional in all of its provisions, in so far as it related to tickets running from in the State out or from out of the State into the State,— in other words, interstate tickets. The language of the court is as follows: —

> "The question involved in this case is whether the contracts of passage evidenced by these tickets were contracts relating to interstate commerce, and whether the penalties prescribed by the article of the statute of Texas above quoted for failing to redeem such tickets, or unused portions thereof, applies thereto. That these excursion tickets were contracts for interstate passenger traffic is too plain for discussion. They entitled the parties to a continuous passage over about five different railroads, beginning in the State of Texas and ending in the State of Kentucky, through two intermediate States. We also think that Congress, under its constitutional power to regulate commerce between the States, etc., had assumed control of the subject of interstate passenger traffic by enacting laws regulating the same. 1 Supp. Rev. St. U. S. (2d Ed.), p. 529; *Id.*, p. 684. And, as the acts here referred to show that Congress undertook to regulate such commerce, *we must presume that it prescribed all the regulations, terms, conditions, and penalties which it deemed proper or desirable, and having failed to prescribe that the unused portions or coupons of tickets in such cases as this should be redeemed, and fix a penalty for the refusal to so redeem, the presumption would obtain that that body intended that no such terms, conditions, or burdens should be imposed on such interstate traffic.*"

It will be seen that this decision of the Supreme Court of Texas is exactly in harmony with the decision of this Court in the case of Sherlock *v.* Alling, from which we have quoted above. Both decisions are squarely upon the proposition that it is within the power and province of Congress to prescribe the rules and regulations which shall affect all manner of interstate commerce, *and to declare the liability which shall follow their infraction;* and all State rules and regulations upon the subject must give way, for if Congress does not prescribe the liability for an infraction of these rules and regulations, it is equivalent to saying there shall be none, and it is not within the power of the State to prescribe any.

The Kansas statute providing the rule for trial of these cases where the action is for damages, or for the prosecution of parties under the criminal feature of the law, is in conflict with the law of Congress enacted May 29th, 1884, for the reason that that law is complete and comprehensive leaving no room for State legislation upon the question. And all State laws, whether enacted before or after the passage of the act of May 29th, 1884, are nugatory and must yield to the superior authority and power of Congress. The power to prescribe these and similar regulations, the power to pass the law of May 29th, 1884, and the power to prescribe the rules and regulations for the transportation of domestic animals, and, in fact, all the rules and regulations under that law, involves the right to declare the exclusive liability which shall follow any infraction of that law; and it is incompetent for the State to legislate upon the same question and prescribe a different set of rules and regulations conflicting with those of Congress and the secretary of the Department of Agriculture, and prescribe a different liability for an infraction of the same.

The law of Kansas does not recognize the results of the experiments conducted by the Bureau of Animal Industry

as of any value whatever. It does not recognize the right given by Congress to the secretary of the Department of Agriculture to make rules and regulations for the transportation of domestic animals into the State of Kansas. The law of Kansas does not admit cattle from south of the thirty-fourth degree of parallel of north latitude under any circumstances, thereby ignoring the law of Congress which does admit cattle from south of that line. It does not recognize the validity of inspections made either under the Federal law or under the laws of any other State; and in this respect it comes very close to the inspection law of Minnesota, which was held unconstitutional by this Court in the case of Minnesota *v.* Barber, 136 U. S., p. 313, page 862, where the Court said:—

> "It will not do to say — certainly no judicial tribunal can with propriety assume — that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals there slaughtered for purposes of human food. If the object of the statute had been to deny altogether the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb, or pork from animals slaughtered outside of that State, and to compel the people of Minnesota wishing to buy such meats either to purchase those taken from animals inspected and slaughtered in the State, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the State, that object is attained by the act in question. Our duty to maintain the constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business of Minnesota as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result."

And this court cannot shut its eyes to the effect of the laws of Kansas as construed by the Supreme Court of that State, in this case, which is to burden the carrier of interstate commerce with a liability not recognized at common law, nor recognized by the laws of Congress or the rules and regulations of the Department of Agriculture promulgated thereunder with reference to this question. Nor can this Court shut its eyes to the further fact that the language of the decision of the Supreme Court of Kansas in this case is defiant; that it denies the power of Congress over this question, and denies the authority and power of the Department of Agriculture with reference thereto; and in fact denies that any authority or power exists either in Congress or the secretary of the Department of Agriculture to make any rules which would have the effect to abrogate in any degree the statutes of Kansas.

III.

Under the Common Law, Also Under the Act of Congress May 29th, 1884, Entitled "An Act Creating a Bureau of Animal Industry," and Under the Act of Congress Entitled "An Act to Regulate Commerce," Approved February 4th, 1887, and Amendatory Acts, and Under the Act of Congress Approved June 15th, 1866, the Carrier Was Bound to Accept and Transport the Cattle in Question.

It is elementary that carriers cannot refuse a commodity which it advertises to carry, without good excuse; that it is bound to accept and transport any commodity which it professes to carry, when the same is tendered to it in the ordinary course of business. This is a general duty which the carrier owes to the public. It is not permitted to make

unreasonable examinations, or to make unreasonable inquiries as to the nature or character of any commodity which is tendered it for carriage. In this case it could make just two inquiries: First, are the cattle apparently healthy? Second, are they from north and west of the government quarantine line? If they were not from north and west of the government quarantine line, then they could not be carried by the carrier except for immediate slaughter. If they were from north and west of the government quarantine line, there was then no Federal prohibition against carrying them if they were apparently healthy.

The carrier went to the very verge in this case. It exacted conditions before accepting these cattle for carriage which it really had no right to exact, and those were permits from the Live-Stock Sanitary Board of the State of Kansas. The cattle as appears, were from north and west of the government quarantine line. They passed all reasonable inspection of the government and State inspectors. Past experience, as well as experiments made by the Bureau of Animal Industry, had developed the fact that these cattle were healthy cattle and incapable of communicating the disease known as Texas splenic or Spanish fever. This is disclosed by the testimony of Mr. Hosier, who testified that cattle had been shipped from the same ranch for three or four consecutive seasons immediately prior to 1892, and that they had never been known to communicate Texas, splenic or Spanish fever before. The locality from which the cattle came was recognized by the Bureau of Animal Industry as being absolutely healthy, and was excluded from that territory known as the infected area. There was nothing in the appearance of the cattle to arouse suspicion, except that they were from Texas and from south of the south line of Kansas. Under the rules and regulations of the Bureau of Animal Industry, they could be taken from that locality to any other locality in the

United States with absolute immunity. It is true that under the law of Kansas they were prohibited from entering the State, because of the fact that they were from south of the south line of the State; but in this respect the law of Kansas and the Federal law, as well as the rules and regulations of the Department of Agriculture, are conflicting, and from the authorities which we cite herein, the laws of Kansas must give way. It was no reason for refusing the cattle, because they were from Texas, and the carrier could not offer that as an excuse for refusing them; nor could it say that it would not receive the cattle because they were from south of the south line of Kansas. There was nothing to inform the carrier that these cattle were dangerous cattle and were capable of communicating a contagious disease, or that they were liable to do so. Although the cattle passed inspector Howard Rhodes, who represented the Live Stock Sanitary Board of Kansas at Fort Worth, Texas, and Inspector A. M. Hunter, who represented the same Board at Parsons, Kansas, yet neither of these men discovered anything in the cattle which indicated that the cattle were of a dangerous character, or that they were capable of communicating Texas splenic or Spanish fever, or were liable to do so; but on the other hand, Mr. Hunter, the live stock sanitary inspector stationed at Parsons, Kansas, stated that the cattle were all right and that he so informed the railroad company. So that outside of the fact that special permits had been given by the Live Stock Sanitary Board of the State of Kansas, admitting these identical cattle into the State, there was nothing in the character of the cattle, there was nothing in the locality or place from which the cattle were shipped, and there was nothing in the locality or ranch upon which they had been kept to indicate that these cattle were of a dangerous character, or were liable or capable of communicating Texas,

splenic or Spanish fever, and the railroad company would have subjected itself to damages to refuse to accept the cattle for shipment.

In Hutchinson on Carriers it is said, and we take this to be elementary and the settled law with reference to the question how far can the carrier go in inquiring into the nature of the property he is to carry :—

> "If the goods or packages are of the character which he usually carries, or which he purposes to carry, the only inquiry which he has a right to make is in regard to their value, and this the law allows him to do for the purpose of fixing the amount of his charge for the carriage, and of ascertaining the amount of responsibility which he is to assume, and the degree of care and attention which he will be required to exercise in respect to them."

We call attention to the case in 15th Wallace known as the Nitro-Glycerine case, wherein it was sought to charge an express company with knowledge of the contents of a package which contained nitro-glycerine which exploded in the company's office in San Francisco, doing great damage to the building in which the office was located and adjoining property. It was clearly shown that the company had no information or knowledge as to the contents of the package, but it was contended both in the Circuit Court, where the case was tried, and also in this court, that it was the duty of the company to know, and upon that question this court decided as follows :—

> "If express carriers are thus chargeable with notice of the contents of packages carried by them they must have the right to refuse to receive packages offered for carriage without knowledge of their contents. It would, in that case, be unreasonable to require them to accept, as conclusive in every instance, the infor-

mation given by the owner. They must be at liberty, whenever in doubt, to require, for their satisfaction, an inspection even of the contents as a condition of carrying the packages. This doctrine would be attended in practice, with great inconvenience, and would seldom lead to any good. Fortunately the law is not so unreasonable. It does not exact any such knowledge on the part of the carrier, nor permit him, in cases free from suspicion, to require information as to the contents of the packages offered as a condition of carrying them."

This same doctrine is sustained in the cases of

Baldwin *v.* Steamboat Co., 74 N. Y. 125;
Sheldon *v.* Robinson, 7 New Hampshire, 157;
Merchants Transportation Co. *v.* Bowles, 80 Ill. 473;
Brown *v.* Railroad Co., 83 Penn. State, 316;
Chicago *v.* Errickson, 91 Ill. 613;
Arton *v.* Sherlock, 75 Mo. 247;
Bowman *v.* Chicago &c. R. R. Co., 125 U. S. 507;
Leisy *v.* Hardman, 135 U. S. 100.

The carrier not being permitted to inquire too closely into the nature of the property it carries, may safely rely upon the information given by the owner of the property. In this case, the information given by the owner was that the cattle were healthy; that they were from his ranch in Pecos County, Texas; that they were just such cattle as he had before shipped into the State of Kansas, and that they were healthy cattle. These were the statements made by the owner. The statements made by the owner were corroborated by the investigation of the Bureau of Animal Industry, which had determined prior to the shipment of the cattle that Pecos County, Texas, was a healthy locality, and that cattle from this county shipped north were incapable of communicating Texas, splenic or Spanish fever. Past experience

in shipping these cattle also corroborated this claim, so that there was nothing to cause the company to hesitate, much less refuse the acceptance of these cattle for shipment and transportation. It cannot be presumed that the carrier has any knowledge that is not communicated to him by the owner of the cattle; and if the carrier has such knowledge, the burden is upon these defendants in error to show by a preponderance of the evidence that the carrier had knowledge of the dangerous character of the cattle, and had sufficient knowledge of their dangerous character to warrant the carrier in refusing to accept them.

IV.

Before the Carrier can be made Liable for Carrying Diseased Animals, it must be Clearly Shown that it had Knowledge of the Character of the Cattle, and that they Communicated the Disease While in its Possession or Control.

This is elementary, and we do not believe, outside of the decision of the Supreme Court in this case, that a decision can be found that even tends to sustain a different doctrine. Mr. Hutchinson in his work on Carriers says, it cannot be presumed that the carrier had knowledge of the dangerous character of the cattle and that such a doctrine would be unreasonable. Mr. Hutchinson in section 441 in his work on Carriers, says:—

> "It would be equally unreasonable to presume that the carrier had knowledge of the nature of the contents of packages carried by him when there are no attendant circumstances to awaken his suspicions as to their true character. It would be unjust to impute to him such knowledge without giving him the right, not

only to inquire of the shipper, but to examine all packages delivered to him, in case he did not choose to rely upon the information thus obtained. Unless, therefore, it be shown that he knew of the dangerous qualities of the goods, such knowledge will not be imputed to him as an inference of law. But losses occasioned to the shippers of other goods by such causes do not come within the legal exceptions to the carrier's liability, and whether he was informed or knew of the danger or not, he will be liable for such losses unless protected by his contract. But he will have his remedy against the shipper of the goods by which the losses were caused."

The Supreme Court of Kansas, in the case of Missouri Pacific Railway Company *v.* Finley, 38 Kansas, 550, also sustains the doctrine that the carrier must have notice of the dangerous character of the cattle before he will be held liable, and speaking with reference to this very statute, says:—

"That statute does not in terms dispense with the necessity of averring and proving the knowledge of the person or corporation attempted to be brought to terms. If the railway company was notified, soon after the cattle were unloaded from the wrecked train, that they were Texas cattle and liable to spread disease among domestic cattle, then it becomes its duty to use precautionary measures to prevent any damage by the communication of disease from the cattle under its charge. Upon such notice, if any was given, the statute had operation. (Laws of 1881, ch. 161; Laws of 1883, ch. 145; Laws of 1884, ch. 3.) If the company, after such notice, failed to reload the cattle at the wreck, as demanded by the farmers there assembled, but instead drove them to Hiawatha, it did so at its peril, and is liable for damages arising by the communication of disease from the cattle so driven, provided Finley was not guilty of contributory negligence. The company might have corralled the cattle

at or near the wreck, or otherwise prevented them from running at large or going upon the public highway until reloaded."

And in that case they followed the same doctrine laid down in

Patty *v.* Adams, 37 Kansas, page 133.

We also desire to call the court's attention to the case of Furley *v.* C. & N. W. R. R. Co., 57 N. W. 719:—

"The owner of the property was a resident of this State. In the fall of the year previous to the shipment complained of, Brown went to Long Beach to remain during the winter. He shipped his cow, with certain household goods, to that place, and the alleged cause of action arose when he reshipped the property to this State in the spring following. There was nothing in the appearance of the cow indicating that she had any disease. The fact appears to be that she was not diseased. She was milked during all the time she was in the south, and after she was returned to this State, and the milk was used by Brown's family. In the autumn of the following year she was fattened and slaughtered, and her flesh was used for food. There is evidence, however, to the effect that an animal acclimated in the south and removed to this State, may communicate the Texas fever to cattle here without showing any evidence of the disease itself. In view of this claim and the consideration of the fact that the defendant, as a common carrier, is bound to receive and transport freight offered for shipment, it would be unjust and unreasonable to require that it be absolutely liable to pay all damages arising by reason of the carrying of animals that may communicate contagious diseases, without allowing it to be shown that the carrier had no notice, and could not by use of reasonable care have ascertained that the animal belonged to the class, the transportation of

which is forbidden by the statute. We think the statute under consideration does not impose any such absolute liability. The business of a common carrier is not only lawful, but is absolutely essential as an agency in the transaction of the business interests and commercial affairs of the country. Under the facts in this case, the claim of appellee, in the face of the facts pleaded in the answer, is that the defendant was bound at its peril, before receiving the car, to ascertain that the animal was not in such a condition as to communicate the disease to other cattle. Under the law of this State and the act of Congress known as the "Interstate Commerce Law," the defendant was bound to receive freight in car lots, and haul it to its destination. McClain's Code, paragraph 2039, 24 Stat. 379. And the nature of the freight was such in this case that the defendant was bound to act promptly. It was liable to an action for damages if it failed to so act. The contention of plaintiff is that there is a liability for fine and imprisonment and damages for receiving and hauling the car. Suppose that the defendant was a natural person and should be indicted, and he should offer to prove the facts set up in this answer; we think there ought to be no question that it would be a great error to reject the evidence, and hold the defendant guilty of a crime, and imprison him in a county jail for six months, and fine him $1,000. There is nothing in either the letter or spirit of the statute which would sanction any such proceeding. The case is essentially different from those arising upon such police regulations as are enacted for the purpose of regulating dram shops, gambling houses and the smuggling of goods, and the like. Counsel for the appellee, in their argument in this court, say that if the construction of the statute which we have adopted is to prevail, 'it will at once become a dead letter, and may as well be repealed.' We think the fears of counsel are groundless. As we have said, the case at bar is exceptional in its facts. We hold that the defendant should be allowed to show that it was

blameless, if it can make such a showing. The rule in the Small case left that statute in full force, and recovery has been had under that law in a large number of cases, as the reports of the decisions of this court will show. The judgment of the district court is reversed."

In this last case, the property carried by the carrier was from inside of the quarantine line as established by the Secretary of the Department of Agriculture for the year 1892, the property being from the State of Louisiana; and yet the Supreme Court of Iowa held in the above cause that the carrier was not liable for transporting property from inside the infected area, unless it knew absolutely or had reasonable grounds to know, that such property was of a dangerous character. In that case the carrier received the property from a connecting carrier outside of the quarantine line, without inquiry as to its origin; in case at bar, the cattle were received from connecting carrier, but with proper assurance that cattle were from outside of infected area.

The inference to be drawn from this decision is that the court does not understand that all cattle coming from the infected area are capable of communicating disease, and that the carrier is only forbidden to carry from inside the infected area to points north and west of said area, cattle that are capable of communicating such disease. In the case at bar, the cattle were not from inside the infected area; they were entirely from the outside, and were from what was designated by the rules and regulations of the Department of Agriculture as healthy territory, and that cattle coming from this territory or locality should be regarded as healthy cattle, and no restrictions whatever upon their transportation or shipment was or should be imposed. The mere fact that the cattle are from Texas is clearly shown by the evidence in this case not to be suf-

ficient notice of the dangerous character of the cattle, for the reasons that there are portions of Texas (and the locality from which these cattle were shipped was (supposed to be) of that character) where the cattle are just as healthy as they are in Kansas or any other Northern State, and may be shipped from one section of the country to the other with perfect safety.

Then, who is to determine the character of the cattle? Is it to be the quarantine officers of the State, the secretary of the Department of Agriculture, or is it to be the carrier? The Supreme Court of the State of Kansas says, in the decision handed down by it in this case, it shall be the carrier; and, in saying that, the Supreme Court has assumed that the secretary of the Department of Agriculture has no power over this question, and that his rules and regulations are no defense to the carrier; and, in so deciding, we assert that the decision is unreasonable and erroneous.

The railway company are bound to haul the cattle at the quest of the owner, and it can only be charged with damages where the injury is the result of negligence in the handling of the cattle by the carrier. The doctrine has been very clearly announced by the Supreme Court of Missouri in the case of Salvege *v.* St. Louis & San Francisco Railroad Company, 36 S. W. Reporter, 602, where the Supreme Court of that State construed sections 953 and 954 of the Revised Statutes of Missouri of 1889. The section referred to "prohibits the transportation through the State of any Texas, Mexican, "Cherokee or Indian cattle *afflicted with Texas or Span-* "*ish fever*," and in that case the San Francisco Railroad Company, while transporting some of this class of cattle known by the carrier to be this class of cattle, through the State of Missouri, permitted some of the cattle to escape from its cars and wander over the country and spread Texas fever. A party who had sustained a loss sued the

railroad company to recover the amount thereof, and the Supreme Court of Missouri held that it must be shown by the plaintiff, before he could recover of the railroad company, that the railroad company negligently permitted these cattle to escape from its custody; and, because the plaintiff was unable to show the fact of negligence, he was denied the right to recover. In that case the railroad company were not forbidden to carry any cattle except that class of cattle that were afflicted with the disease of Texas or Spanish fever. The railroad company, in carrying the cattle through the State, was violating the sections of the Missouri statute forbidding the carrying of those cattle afflicted with that disease. No negligence was shown in the case at bar; no complaint of negligent handling of cattle was shown in the case at bar; but the claim rests upon the fact that the railroad company knew the cattle were from south of the south line of Kansas and were from Pecos County, Texas, and that it knew of the fact that the owner was to drive the cattle through the country and that the cattle did, in fact, spread Texas fever. No attempt was made to show, nor is there any evidence looking that way, that the railroad company had any knowledge of the fact that the cattle were capable of communicating the disease at the time they were received for transportation.

V.

The Railroad Company in Bringing in the Cattle in Question was not Guilty of a Violation of any Quarantine or Inspection Law Enacted by the State.

As early as 1873 the legislature of the State of Kansas recognized the right of a carrier to bring cattle into the State from south of the south line of the State (section

6707, *supra*, p. 12); it further recognized its inability to prohibit such importations, and, therefore, provided in section I of chapter 139 of the Laws of 1873 (*Id.*), for a quarantine ground where these cattle could be stopped, unloaded, inspected and kept until danger of communicating contagious disease was past, and then reshipped to the point of destination within the State. That provision is still on the statute book. The ground described is exempt from all provisions prohibiting the importation of Texas cattle, or cattle communicating this disease, and the enactment of this provision is a direct recognition of the rights of interstate carriers to bring cattle into the State of Kansas.

If the proper authorities of the State, knowing as they did in this case that such cattle were coming, could, if they had deemed the cattle dangerous, have stopped them at the quarantine ground and detained them until danger had passed; and the fact that these cattle were not placed in the quarantine ground, as provided for by the legislature in this case, indicated that the quarantine officers or State authorities considered them safe. As to whether or not they are safe cattle, by the laws of the State it is made the duty of the State Board of Live Stock Sanitary Commissioners and the State Veterinary Surgeon, who is appointed by the Governor, to investigate and determine such fact; but it is nowhere made the duty of the railroad company, or any of its employees, to investigate the question and determine for the State and be responsible in case it should fail to do so. In this connection, we desire to call the Court's attention to article 11 of chapter 105, General Statutes of 1889, which relates exclusively to the State veterinary and his duties. Section 6798, *supra*, p. 16, provides that the Governor shall appoint a competent and skilled veterinary surgeon for the State, who at the date of such appointment, shall be a graduate in good standing of

some recognized college of veterinary surgery, and who shall hold his office until his successor is appointed and qualified. The next section, *supra*, p. 17, provides for the duty of the State veterinary, and that he shall qualify by taking an oath and giving a bond for the faithful discharge of his duties, etc. Then the next section 6800 requires to investigate as to diseases of cattle in the State.

The next succeeding section, *supra*, requires him to make scientific investigation of the whole subject of diseased cattle and contemplates that the veterinary shall not confine his studies to such diseases as he may find within the State, but that he can extend his researches, his investigation and his studies to diseases of any and all domestic animals wherever such disease may appear. Not only does he study the disease from a scientific standpoint but he investigates as to the causes and the preventives and cures thereof, and he shall report the result of his study and investigation to the Secretary of the State Board of Agriculture, giving in plain and ordinary language the symptoms, etc., and how liable to be introduced and spread. When the State veterinary has complied with this section of the statute then the executive department is fully informed as to the section from which the disease may come into the State and is fully informed as to the nature of the disease, and exactly what steps are necessary to prevent its importation or to control the disease after it has been imported into the State and the manner of dealing with it and all questions relating to this matter are then left to the Live Stock Sanitary Commission, composed of three men, who, like the State veterinary, are required to take an oath for the faithful discharge of their duties, and are also required to give a bond. It is also made the duty of this board to make a study of the diseases of domestic animals and to protect the animals of the State from all diseases of an infectious or contagious character, and for such purpose

are empowered to establish, maintain and enforce such quarantine, sanitary and other regulations as may be deemed necessary.

We pass to section 6819, *supra*, p. 26, passed at the same session of the legislature, which gives the Governor power to issue a proclamation and quarantine against any dangerous, contagious or infectious disease which has become epizootic in certain localities in other States.

The Governor may get this information from the veterinary surgeon, and this section provides that even though the cattle come from section of the country in other States which the Governor understands to be affected with a contagious or infectious disease, yet he has no power to prohibit the importation of these animals, if they are covered by a certificate of health given by a *duly authorized inspector*.

In this case the defendant companies had proper *certificates of health given by a duly authorized inspector* (see page 29 of the printed record). It does appear that he was empowered by the Live Stock Sanitary Commission to issue certificates of the health of cattle being transported into the State and that he acted for them under such authority in the giving of the certificates so that under this section of the statute, even though the animals had been prohibited by the proclamation of the Governor from entering the State as dangerous cattle, the proclamation would only affect them if they attempted to enter the State without the proper certificate, and if they had the proper certificate they could then enter the State regardless of the fact that they had come from territory which, according to the Governor's proclamation, was designated as an infected area.

The cattle in question were accompanied by the certificates provided for by this section of the law. Suppose they had not been. This section provides when not

accompanied by this certificate of health that all such animals arriving in this State shall be examined without delay by the State veterinary surgeon and, if deemed necessary, placed in close quarantine until the danger of infection has passed, when they shall be released by the order of the veterinary surgeon or the Live Stock Sanitary Commission. There is no evidence in this case that the cattle imported were not examined by the veterinary surgeon of the State. It was one of his duties to examine them. The railroad company has no control over them. It is not pretended anywhere in the record that it interfered with the proper discharge of his duties or that it interfered in any manner with the proper discharge of the duties of the Live Stock Sanitary Commission. The facts are, that one A. M. Hunter, acting for the Live Stock Sanitary Com mission, was stationed at Parsons, Kansas, to investigate Southern cattle being transported over the road and that he examined these cattle and says they were all right. Their papers were all right. See page 75 of record.

In case Hunter thought the cattle dangerous it was his duty under this section of the statute to *stop* the cattle and hold them until all danger of infection had passed.

VI.

The Railroad Company is not Liable Because the Injury Complained of is too Remote.

These cattle could have been driven into the State from south of the south line of Kansas, by the owner, with consent of the State Live Stock Board. Consequently, the fact that the carrier, the plaintiff in error in this case, owned a line of railroad and permitted the owner of the cattle to ship them over its line of railroad, did

not in any way contribute to the spread of the disease. Is it to be made liable solely upon the ground that it owns a line of railroad and is engaged in the business of a common carrier — was that the only way these cattle could have been gotten into the State. Suppose the M. K. & T. Ry., stopped three miles south of the south line of Kansas and the cattle had been there unloaded and the cattle driven into the State by the owner, would the company still be liable because it had carried the cattle for the owner within three miles of the State line and thereby facilitated the passage of the cattle into the State? If the plaintiff in error is liable at all it must be made liable under some general principle of the common law for there certainly is no statute which in terms attempts in any way to make it liable. The statute refers to the owner of the cattle, and to such persons as may have the cattle in charge. The testimony in this case discloses that the railroad company never did have the cattle in charge. It could not load them or unload them. It had no control over them. If a steer was down in a car it was not the duty of railroad employees to get it up. They had no control over the cattle. The cattle were never in charge of the railroad company. It did not feed or water them. All it did was to pull the cars in which the cattle were loaded over its track and facilitate the passage of the cattle.

No importance whatever can be attached to the fact that the railroad company solicited the shipment and named a through rate from the origin of the shipment to destination. Other railroads solicited the shipment, as is clearly shown by the testimony of Mr. Hosier. Will it be claimed for a moment that because they solicited the shipment and endeavored to get it that they too are liable in this case? That is exactly where the logic of the opinion handed down in this case will lead us, if followed out to its legitimate

results. They were just as willing to bring the cattle in as was the plaintiff in error in this case.

In the opinion the Supreme Court further overlooked a question decisive of the case in this, that even though the company had violated a statute of the State of Kansas in bringing in or handling of these cattle, yet, if no damage resulted directly from its act, it cannot be held liable for damages which afterwards accrue or result from the handling of the cattle by other parties.

There is no question but what its connection with the cattle ceased upon its delivery of them to Hosier Brothers. While the railroad company may have known of the fact that Hosier Brothers were contemplating driving the cattle through the country, yet it had no power to prevent their doing so. It did not understand that Hosier Brothers would not change their intention and take the cattle in some other direction or leave them in the pasture at Hartford. The railroad company having no direct control over the cattle after delivering them to Hosier Brothers at Hartford, could not be made liable by reason of any act of Hosier Brothers in handling the cattle afterward which resulted in communicating a contagious disease to native cattle coming in contact with them. There are authorities to sustain this proposition. They are from Missouri, and the proposition decided is sound and has received the sanction of the bench and bar ever since the decision was rendered. There it was held:—

> "Though a company may have violated the statute by bringing Texas cattle into the State, it is not liable for the spread of the disease after it has parted with them and they have been driven by the owner into another county, as each transportation is a separate offense."

Surface *v.* H. & St. Jo. Ry. Co., 60 Missouri, 216;

Wilson *v.* K. C., St. J. & C. B. Ry. Co., 60 Missouri, 195;
Surface *v.* H. & St. J. Ry. Co., 63 Missouri, 452.

The statute of Missouri directly prohibited the railroad company from transporting into the State certain cattle during certain seasons of the year, and in terms made the carrier liable for damages should it do so. But the court held that the disease causing the damage must be communicated by the cattle while in the possession of the railroad company. After it had parted with the possession of the cattle and the owner had driven them into another county and there communicated the disease to native cattle the railroad company was not liable. This seems to be very sound doctrine and a complete defense in this case, but was overlooked and not considered by the Supreme Court of Kansas in this case, though well worthy of its consideration. Our statute contains no such provision. If the doctrine announced in the opinion handed down in this case is to prevail and become the law of the State, then no man can safely engage to assist the owner in driving cattle from south of the south line of Kansas without making himself liable in case damages accrue.

In this case the Court instructed the jury on the trial thereof as follows:—

> "It is the duty of anyone in the pursuit of any lawful business to exercise due care and caution that others shall not be injured thereby; and while a common carrier, such as is the defendant railway company, is bound to accept for transportation any freight tendered it which it may be lawful to carry, it must exercise due care and caution in doing this that it does not invade the rights of others, and it is not required to take for transportation or to transport any article forbidden by

the law to be transported or the transportation of which will injure others, provided it can ascertain by due diligence that such article is liable to injure or cause damage to those with whom it may come in contact during its transportation or at its destination."

The instruction had no application whatever to the facts in this case. It was not the act of the railroad company in bringing in the cattle that caused the injuries complained of by the several claimants herein. In giving this instruction, a new rule affecting carriers seems to have been evolved in the mind of the Court. Interpreting it literally, the carrier must say, when tendered cattle from south of the south line of Kansas for shipment into the State of Kansas, not only "from what section of the country do those cattle come," or, in other words, "where did this shipment originate," but he must go further and cross-examine the owner of the cattle as to what he intends to do with them at destination; if the owner is going to slaughter them, then the carrier may take them; but if the owner is going to drive them to his ranch a few miles from the station where unloaded, then the carrier must refuse to take them. It would seem that this was adding a burden to interstate commerce and surrounding it with conditions and restrictions, and as such invades the exclusive domain of Congress.

It cannot be claimed in this case that the act of the railroad company in bringing the cattle into the State spread Texas fever or communicated it to the native cattle of the State; it was after the railroad company ceased to have any connection with these cattle and they were being driven by the owner of the cattle to his ranch in the country, that the disease was communicated, and the only claim is that the railroad company assisted the owner in bringing the cattle into the State; that its agency as a carrier must make it liable equally with the owner of the property. The common law says that where one of two innocent parties

must suffer for an injury; he that did the injury is the one who shall suffer; but we know of no proposition at common law that makes the carrier liable simply because of its agency in bringing cattle into the State that shall, after having mingled with the property of the State, and when beyond the control of the carrier, communicate a contagious or infectious disease. It would seem to me that the proper course would have been, if there was any indication that the cattle were dangerous, for the State police power to have taken charge of them at destination and secluded them until all danger of contagion was past.

In the foregoing pages of this brief we have set out the laws of the United States, the regulations of the Department of Agriculture thereunder, the laws of the State of Kansas bearing upon the question of diseased cattle, the communication of contagious or infectious diseases among cattle, their transportation, and we have made an elaborate statement of the record in the case showing what the questions at issue are, and how they arose, and have followed with a lengthy argument, citing many authorities. Our apology, if any there need be, for the volume of the brief is the magnitude and importance to the transportation companies of the country of the questions involved. By a surprising and unexpected decision of the Supreme Court of Kansas the defendant company has been held responsible for large amounts of damages which it is claimed were done by the communication of the disease known as Texas or Spanish fever from the cattle of shippers over the line of the defendant's railway to the cattle of the claimants. For many years past there has been more or less excitement among the people of the Central and Northern States over the Texas fever. The nature of the disease was long, and still is, to some extent, a mystery. A striking peculiarity of it is that the South-

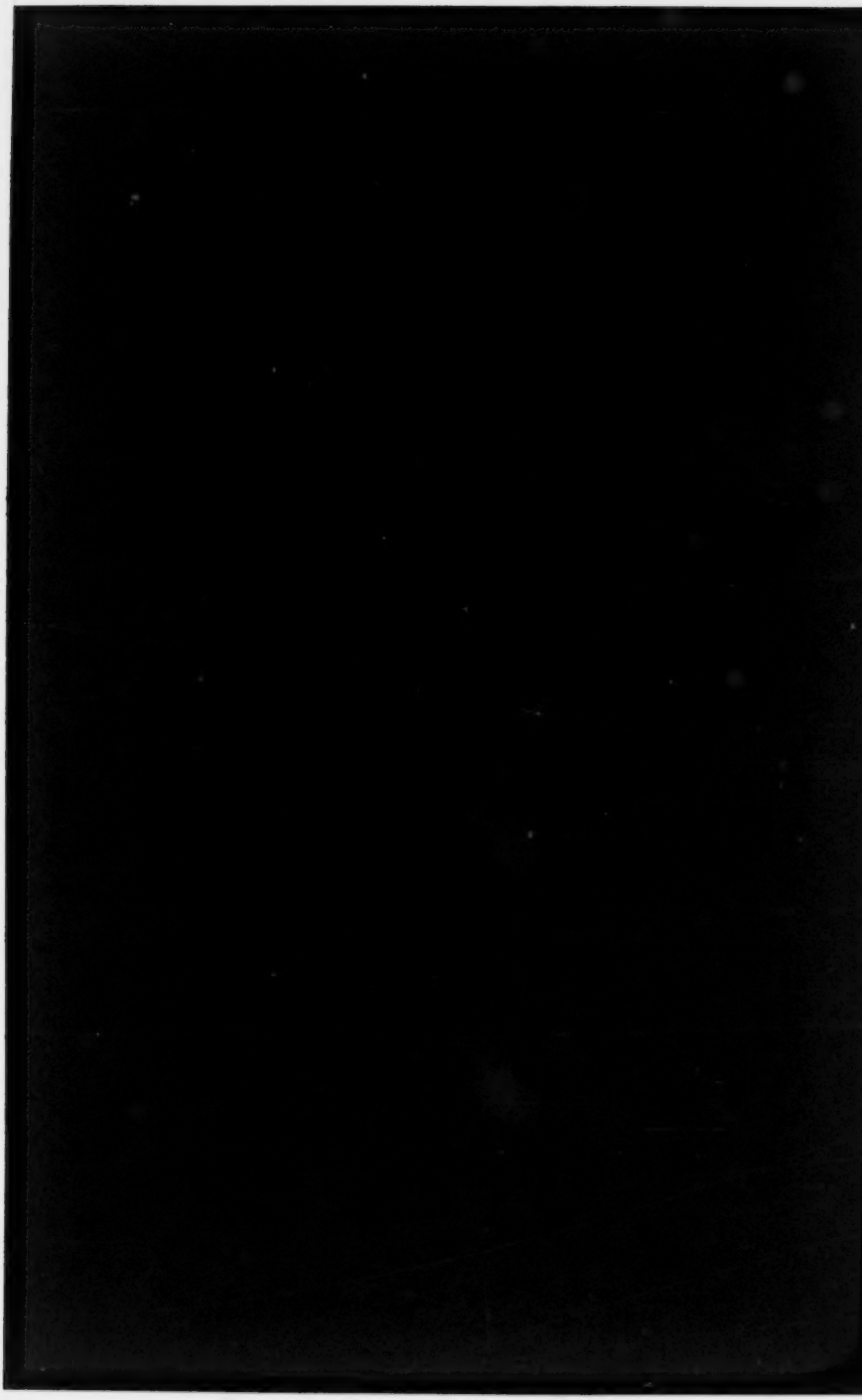
ern cattle which communicate the disease are to all intents and purposes practically healthy and sound. The scientists, the sanitary boards, Federal and State, all the wise and learned doctors, long since concluded, and still maintain, that Southern cattle coming from certain sections of the country bordering on the Gulf of Mexico, during certain periods of the year, to the North, bring with them the seeds of the disease, which may be communicated to the northern cattle when the two kinds of cattle are brought into contact with each other. In dealing with this question the legislatures, Federal and State, and the public authorities, Federal and State, have always dealt with it upon the theory that there were certain infected districts from which the disease might be brought from the South to the North. Quarantine lines have therefore been established, and have been changed from time to time, and the States have had from time to time different quarantine lines from those of the Federal government. Practical experience proved that the States were incompetent to deal with this question, and the Congress of the United States was appealed to by the people and by many of the States, notably Kansas, to pass laws upon the subject. In response to that appeal Congress has acted, and the States have generally either conformed their laws to that of Congress or acted in harmony with the Federal officials. In the case at bar the defendant company is, and has been from the beginning, innocent of any wrong-doing. It has made every effort to comply, not only with the laws and rules and regulations of the Federal government, but with those of the different States. If the decision of the Supreme Court of Kansas be affirmed, innocence, not guilt, will be condemned. Upon the demand of the owners of the Texas cattle in question the defendant company received them for transportation from a connecting carrier at the northern line of Texas, with accompanying proofs that the

cattle were healthy and had never been within the infected district as mapped out by the quarantine line of the Federal government within the times prohibited by the acts of Congress or the laws of Kansas, and likewise accompanied by permits from the Sanitary Board of Live Stock Commissioners of the State of Kansas, the tribunal having in charge, under the laws of that State, the administration of the subject of diseased cattle, authorizing the introduction of these cattle into Kansas, and carried the cattle in the cars in which it received them to their destination at the Kansas station, and there delivered them to the owners. After the Texas cattle were delivered to the owners, and the defendant company had ceased to have possession or control of them, they were by the owners brought into contact with domestic cattle, and it is claimed that by such contact the Texas fever was communicated to the domestic cattle. The only connection therefore of the railway company with the Texas cattle was the simple act of transporting them on an interstate journey. This act is the sole basis on which the liability of the company is made to rest. This act of interstate transportation cannot be burdened with a liability such as that which the Kansas courts seek to impose. This act of transportation upon the part of the company was an act done under the authority of the Federal law, and State laws cannot in either civil or criminal proceedings, hold the company responsible therefor.

In view of the transcendent importance of this case, we invoke for it this court's careful and deliberate consideration.

Respectfully submitted,

JAMES HAGERMAN AND
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 268.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
Plaintiff in Error,

vs.

CHARLES HABER *et al.*,
Defendants in Error.

In Error to the Supreme Court of the State of Kansas.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

It is not intended in this brief to set forth again the facts involved in this case. These, together with the assignments of error and many of the principles and authorities that are applicable, are stated with great clearness and detail in the brief already filed for the plaintiff in error by Mr. Hagerman and Mr. Sedgwick. There are some questions, however, that are of sufficient importance to justify the submission of an additional brief, presenting them from another point of view for the consideration of this Court. And, first, on the matter of jurisdiction.

I.

It is the right and duty of this Court to entertain jurisdiction of the case at bar.

Counsel for defendants in error in their brief seek to make it appear that there is some doubt whether there is such a Federal question involved as to give this Court jurisdiction to consider the case by writ of error to the State court. The argument by which it is endeavored to show this does not seem to us to be well founded, as an examination of the previous decisions of this Court abundantly proves that jurisdiction has been asserted by it time and again in similar cases. The jurisdiction of the Supreme Court to review by writ of error the decision or judgment of the highest court of a State is given by Section 709 of the Revised Statutes, which is substantially the same as Section 25 of the Judiciary Act of 1789. Section 709 U. S. Revised Statutes provides as follows:

> "Sec. 709. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, *or an authority exercised under the United States*, and the decision is against their validity; *or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority*, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of

> error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States (and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed).
>
> The Supreme Court may (reaffirm) reverse, modify or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."

Under the terms of this section we have present here two of the grounds of jurisdiction stated. In the first place, the validity of a State statute has been drawn in question as being repugnant to the Constitution of the United States and the decision of the State court has been in favor of the validity of such statute. Secondly, a right, privilege or immunity has been claimed under the Constitution of the United States and under an authority exercised under the United States, and the State court has decided against such right, privilege or immunity.

The second defense contained in the amended answer of the Missouri, Kansas and Texas Railway Company as defendant in the State court sets forth substantially that that company is engaged in the conducting of an interstate transportation business, and that the transportation of the cattle which has given rise to this litigation was an interstate shipment of cattle (see Transcript of Record, pp. 19-20). The answer further alleges in the fourth defense that Congress had acted upon the subject of interstate commerce or shipment of cattle by the passage of the act of May 9, 1884, entitled "An Act for the establishment of a Bureau of Animal Industry to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious

diseases among domestic animals," and by the further act of April 4, 1891, making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1892, and by the regulations issued on February 26, 1892, by the Secretary of the Department of Agriculture concerning cattle transportation, which regulations were so issued by that officer in pursuance of the authority given by the terms of the Act of May 9, 1884, above referred to.

See Transcript of Record, pp. 19–20 and 21–22.

We see, therefore, that the answer itself distinctly sets forth two defenses, presenting "Federal questions" such as are intended by the Judiciary Act to give to the Supreme Court jurisdiction by writ of error. If any further evidence of this were desired it is furnished by the Supreme Court of Kansas in the opening words of its opinion, deciding adversely to the Missouri, Kansas and Texas Railway Company the appeal which had been taken by that company from the judgment of the trial Court of the State. The Supreme Court of Kansas said:

> "The main contention of counsel for the plaintiff in error is that *this was an interstate shipment of cattle*; that the company's connection with the whole matter was that only of a common carrier; that it complied with all the regulations prescribed by the Department of Agriculture under the act of Congress; that the Federal statute and the regulations established by the Secretary of Agriculture under it is the supreme law, and in effect repeals all provisions of the laws of Kansas in any manner conflicting therewith; that the company was bound as a carrier to receive and transport the cattle because they were loaded at a point without the quarantine line established by the Secretary, and the shippers were furnished with a permit issued in accordance with the regulations governing such shipments; that it delivered them to the own-

> ers at their destination; that no injury resulted to any one from the cattle while in the railroad company's charge, and that no culpable conduct on their part is shown to have contributed to the plaintiff's loss."
>
> See Transcript of Record, p. 289.

If the shipment of cattle involved in this case was an "interstate shipment of cattle," then any statute of the State of Kansas interfering or assuming to regulate such interstate shipment of cattle, is in conflict with the Constitution of the United States and void. But the Supreme Court of Kansas in its opinion says:

> "The validity of the statutes of this State passed for the protection of domestic cattle against Texas or splenic fever, has been considered by this Court and upheld."
>
> See Transcript of Record, p. 292.

In other words, the State court decided in favor of the validity of a State statute claimed to be in conflict with the Constitution of the United States, and thus clearly gives to the United States Supreme Court jurisdiction to review the case by writ of error. The jurisdiction of this court on this ground alone is therefore beyond possibility of controversy.

As shown by the opinion of the State court, however, there was considered by that court the further question of the effect of the action of Congress on the subject of interstate cattle transportation by the passage of the acts which we have mentioned and the issuing of regulations in pursuance thereof by the Secretary of Agriculture. The plaintiff in error claimed immunity from suit on the ground that it had fully complied with all obligations imposed upon it by such acts and regulations, but the State court decided that they furnished the plaintiff in error no protection. Under these circumstances, then, counsel for defendants in error seem to think that there

has been no decision by the State court against any right, privilege or immunity claimed under Federal statutes, because, as they say in their brief (pp. 14-15), " the averments of the railroad company's answer show that it did not have any rights under any Federal law, power or authority, which could in any manner be involved in this case. The company's answer assumed things that the pleaded act of Congress did not confer but clearly denied." So far as we can understand the argument of counsel for defendants in error, it seems to be that under the construction given to the Federal act and regulations by the State court, such act and regulations gave plaintiff in error no protection, and that since they did not give any protection there has been no decision against any right, privilege, immunity or authority exercised under the United States. In other words, there being no authority there could not be any decision against such authority. It would be very strange, however, if the Supreme Court of the United States could be deprived of the jurisdiction contemplated to be exercised by it from the time of the passage of the Judiciary Act of 1789 down to the present day, by the construction given to an act of Congress by the courts of a State; or if the view of a State court as to the protection afforded by, and the scope and intent of, a Federal act were conclusive upon this Court. It that were possible, there could never be a decision by a State court against any right, privilege, immunity or authority exercised under the United States. All that the State court would have to do would be to decide that the constitution, treaty or statute of the United States which it was claimed gave such right, privilege, immunity or authority did not in fact give it. Such a doctrine is neither founded on reason nor based on authority. It need only be stated to furnish its own contradiction.

Where the decision of the State court is against an authority set up under an act of

Congress the Supreme Court of the United States has jurisdiction.

McGuire v. *The Commonwealth*, 3 Wall., 382.

Same v. *Same*, 3 Wall., 387.

And as remarked by Chief Justice Marshall in the leading case of

Cohens v. *Virginia*, 6 Wheaton, at p. 430,

on a motion to dismiss the case for lack of jurisdiction, the fact that the question before the Court on such motion was one of construction of the Constitution and of the law proved that the Supreme Court had jurisdiction.

> "The character of a case is determined by the questions involved (*Osborn* v. *Bank of United States*, 9 Wheat., 737, 824). If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise not. Such is the effect of the decisions on this subject (*Cohens* v. *Virginia*, 6 Wheat., 264, 379; *Osborn* v. *Bank of United States*, 9 Wheat., 737, 824; *The Mayor* v. *Cooper*, 6 Wall., 247, 252; *Gold Washing & Water Co.* v. *Keyes*, 96 U. S., 199, 201; *Tennessee* v. *Davis*, 100 U. S., 257, 264; *Railroad Co.* v. *Mississippi*, 102 U. S., 135, 140; *Ames* v. *Kansas*, 111 U. S., 449, 462; *Kansas Pacific* v. *Atchison Railroad*, 112 U. S. 414, 416; *Provident Savings Co.* v. *Ford*, 114 U. S., 635, 641; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11)."

See *Starin* v. *New York*, 115 U. S., 248, at p. 257.

> "Whether a suit is one that arises under the Constitution or laws of the United States is determined by the ques-

> tions involved. If from them it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States (*Osborn* v. *Bank of the United States*, 9 Wheat., 738; *Starin* v. *New York*, 115 U. S., 248, 257)."
>
> See *Cooke* v. *Avery*, 147 U. S., 375, at pp. 384–385.

In the analogous case of the impairment of a contract by State legislation, the Supreme Court never allows itself to be deprived of jurisdiction by any decision of a State Court to the effect that there is no contract.

> "This Court has always jealously asserted the right when the question before it was the impairing of the obligation of a contract by State legislation to ascertain for itself whether there was a contract to be impaired. If it were not so the constitutional provision could always be evaded by the State courts giving such construction to the contract or such decisions concerning its validity as to render the power of this Court of no avail in upholding it against unconstitutional State legislation."
>
> *Delmas* v. *Insurance Co.*, 14 Wall., 661, at p. 668.

See also

> *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 116.

Further citations of authority are unnecessary. In fact, the matter is so elementary that it would not have been discussed at such length did not counsel for defendants in error appear to seriously entertain the idea that the jurisdiction of the Supreme Court of the United States can be defeated in such a way. The question whether the act of Congress confers or denies any authority, privilege or immunity is one

that evidently depends upon the construction given to such act, and the right finally to construe it for the purpose of determining that question belongs, and properly so, to the Supreme Court of the United States. The decisions cited in the brief of counsel for defendants in error at pages 16 and 17 are all irrelevant. They deal with cases in which there have been two independent grounds for the judgment of the State court—one involving a Federal question and the other involving a question not Federal. The rules laid down in those decisions are certainly not disputed here. All that is disputed is their materiality or relevancy. If the judgment of a State court can be supported on the ground that it correctly determined a question not Federal and decisive of the case, the Supreme Court will not interfere though the State court may at the same time have incorrectly decided a Federal question. But where, as here, the whole *gravamen* of the case has been the Federal question, where it is claimed that the State statute is initially void as being an unwarranted interference with interstate commerce, and where the plaintiff in error claims that a privilege, immunity or authority which is his under Federal statutes and regulations has been denied him, the Supreme Court must and will take jurisdiction for the purpose of asserting the supremacy of the Constitution and laws of the United States as against unconstitutional State legislation, and of giving to the plaintiff in error—if entitled to it after an examination of the question by this Court—the protection which such Constitution and laws afford.

II.

The statute of Kansas on which the action of the plaintiff in the State court was based, is, so far as it affects the shipment of cattle involved in this case, or any interstate shipment of cattle whatever, unconstitutional and void.

The statute in question is Chapter 191 of the Laws of 1885 of the State of Kansas, as amended by Chapter 201 of the Laws of 1891. It forms Sections 6771, 6772, 6773, 6774, 6775, 6776 and 6777 of the general statutes of Kansas, and will be found printed in full at pages 11–14 of the brief filed on behalf of the plaintiff in error herein by Mr. Hagerman and Mr. Sedgwick.

The Federal Constitution provides as follows:

> "The Congress shall have power * * * to regulate commerce with foreign nations, *and among the several States*, and with the Indian tribes."
>
> Constitution of the United States, Art. 1, Sec. 8.

> "*This Constitution and the laws of the United States which shall be made in pursuance thereof: and all treaties made or which shall be made, under authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.*"
>
> Constitution of the United States, Art. 6.

Under the Constitution, therefore, the power to regulate interstate commerce is given to the Federal Government to be exercised exclusively through Congress. This power embraces the whole domain of interstate commerce by land and water, and

every instrumentality by which that commerce is carried on. The repeated decisions of this court on the general subject of interstate commerce regulation have established this so clearly that it is unnecessary to take up any time in its discussion. Nor is it necessary to show that the shipment of cattle which gave rise to this case was an interstate shipment, and, therefore, interstate commerce. A full statement of the authorities on these points will be found in the brief already filed for the plaintiff in error. The question has been mooted, however, as to the limitations within which a State may validly legislate, in the absence of Congressional action on any matter that comes within the field of interstate commerce regulation. That question is very clearly answered by this Court in its decision in the case of

Brown v. *Houston*, 114 U. S., 622,

from the opinion in which case we quote at some length:

> " The power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations. If not in all respects an exclusive power; if, in the absence of Congressional action, the States may continue to regulate matters of local interest only incidentally affecting foreign and interstate commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, &c., still, according to the rule laid down in *Cooley* v. *Board of Wardens of Philadelphia*, 12 How., 299, 319, the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation; and is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction. All laws and regulations are restrictive of natural freedom to some extent, and where

no regulation is imposed by the Government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that that commerce shall be free and untrammelled; and any regulation of the subject by the States is repugnant to such freedom. This has frequently been laid down as law in the judgments of this Court. In Welton *v.* State of Missouri, 91 U. S., 282, Mr. Justice Field, speaking for the Court, said: 'The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled.' This was said in a case where the plaintiff in error had been convicted of selling goods without a license under a law of the State of Missouri, which prohibited any person from dealing as a peddler without license, and which declared that a peddler was one dealing in goods or wares, not the growth, produce or manufacture of this State (Missouri), by going from place to place to sell the same.' To the same purport, and on the same subject generally, see *Gibbons* v. *Ogden*, 9 Wheat., 1209; *License Cases*, 5 How., 504, 575, 592, 594, 600, 605; *Passenger Cases*, 7 How., 282, 407, 414, 419, 445, 462-464; *Crandall* v. *Nevada*, 6 Wall., 35, 41-49; *Paul* v. *Virginia*, 8 Wall., 168, 182-184; *Ward* v. *Maryland*, 12 Wall., 418, 430-431; *State Tax on Railway Receipts*, 15 Wall., 284, 293; *The Lottawanna*, 21 Wall., 558, 581; *Henderson* v. *Mayor of New York*, 92 U. S., 259; *Sherlock* v. *Alling*, 93 U. S., 99; *Railroad Co.* v. *Husen*, 95 U. S., 465; *Cook* v. *Pennsylvania*, 97 U. S., 566; *Guy* v. *Baltimore*, 100 U. S., 434; *Tiernan* v. *Rinker*, 102 U. S., 123; *Packet Co.* v. *Catlettsburg*, 105 U. S., 559; *Transportation Co.* v. *Parkersburg*, 107 U. S., 691, 701; and see *Moran* v. *New Orleans*, 112 U. S., 69."

See *Brown* v. *Houston*, 114 U. S., at pages 630-631.

In the absence of congressional action the States may only regulate matters of local interest and merely incidentally affecting interstate commerce. But where the matter is national in character and admits of one uniform system or plan of regulation, no State has power to make any law or regulation whatever. This brings us to the consideration of the effect of the Kansas statute which is involved in the present case. That statute prohibits any person between the first day of February and the first day of December of any year from driving or causing to be driven into or through any county, or part of a county, in the State of Kansas, any cattle "capable of communicating or liable to impart what is known as Texas, splenic or Spanish fever." The violation by any person of such prohibition is a misdemeanor, punishable by fine and imprisonment. The statute further provides that any person who shall drive, ship or transport, or cause to be shipped, driven or transported into or through any county in the State of Kansas, any cattle "liable or capable of communicating Texas, splenic or Spanish fever to any domestic cattle" of the State shall be liable to any persons injured thereby for all damages that the persons so injured may sustain by reason of the communication of the disease, such damages to be recovered in a civil action in any court of competent jurisdiction. It then goes on to say that, in the trial of any person charged with the violation of any provision of the act and in the trial of any civil action brought to recover damages for the communication of the disease known as Texas, splenic or Spanish fever, proof that the cattle which such person is charged with shipping or driving, or which are claimed to have communicated the disease were brought into the State of Kansas from south of the 37th parallel of north latitude, which is the southern boundary line of the State of Kansas, shall be taken as *prima facie* evidence that such cattle were between the first day of February and the first day of December of the year in which the offense was

committed "capable of communicating and liable to impart Texas, splenic or Spanish fever within the meaning of this act, and that the owner or owners or person or persons in charge of such cattle had full and complete notice thereof." This statute, it will be seen from the outline here given, makes a misdemeanor punishable by fine and imprisonment of the same act for which it gives to a party claiming to be injured a civil action for damages, and the same rule of evidence is created by the statute to apply to the trial of a person charged with such a misdemeanor as is created under the statute to apply to the trial of such civil action.

Considering the statute as a whole and with reference to the case at bar, it is important for the Court to look very closely into its penal provisions. We therefore set out again enough of those provisions to enable the Court to see their scope and effect:

> "Section 6771. No person or persons shall, between the first day of February and the first day of December of any year, drive or cause to be driven into or through any county or part thereof in this State, or turn upon or cause to be turned or kept upon any highway, range, common or pasture within this State, any cattle capable of communicating or liable to impart what is known as Texas, splenic or Spanish fever. Any person violating any provisions of this act shall, upon conviction thereof, be adjudged guilty of a misdemeanor, and shall for each offense be fined not less than five hundred dollars nor more than two thousand dollars, or be imprisoned in the county jail not less than thirty days and not more than one year, or by both such fine and imprisonment."
>
> "Section 6775. In the trial of any person charged with the violation of any provisions of this act * * * proof that the cattle which such person or persons are charged with shipping, driving, or keeping, * * * were brought into this State from south of the thirty-seventh parallel of north latitude,

> shall be taken as *prima facie* evidence that such cattle were, between the first day of February and the first day of December of the year in which the offense was committed, capable of communicating and liable to impart Texas, splenic or Spanish fever, within the meaning of this act, and that the owner or owners or person or persons in charge of such cattle had full knowledge and notice thereof."

Now, it will be noticed that the offense or misdemeanor which is created by the statute consists in the driving or keeping of cattle "*capable of communicating or liable to impart Texas, splenic or Spanish fever*," and not necessarily actually afflicted with that disease. When, therefore, the statute makes the fact that the cattle come from south of the southern boundary line of Kansas *prima facie* evidence that they are capable of communicating and liable to impart Texas fever, it practically makes such fact conclusive evidence against the person charged with the offense. In one sense any cattle are "*liable to impart*" or "*capable of communicating*" disease, and disproof of such "liability" or "capability" would, in any case, be a very difficult matter. To make, by a statutory enactment, all cattle from south of a certain line *prima facie liable or capable of communicating the disease*, is therefore equivalent to conclusively declaring them so *liable or capable*. That is to say, the statute practically declares every man guilty of an offense created by it who brings into the State of Kansas between the first day of Febuary and the first day of December (or during ten months of the year) any cattle that come from south of the line mentioned. This statute is in its penal provisions certainly unconstitutional, in that it deprives persons prosecuted under it of the presumption of innocence, and therefore takes away their liberty without due process of law.

> "FIRST.—We may mention that the humanity of our law always presumes an ac-

> cused party innocent until he is proved to be guilty. This is the presumption which attends all the proceedings against him, from their initiation until they result in a verdict, which either finds the party guilty or converts the presumption of innocence into an adjudged fact."
>
> *Cooley's Constitutional Limitations*, 6th Ed., p. 375.

And Judge Cooley also says (Constitutional Limitations, p. 377) that this presumption of innocence can only be overcome either, "first, on confession in open Court; or second, on proof which places the guilt beyond reasonable doubt." In the case of

State v. *Divine*, 98 North Carolina, p. 778,

the Supreme Court of North Carolina had under consideration a statute passed by that State which made the fact of killing of cattle by a railroad train *prima facie* evidence of negligence, and also made such negligence a misdemeanor on the part of the superintendent and president of the railroad company. The Court held the statute unconstitutional as depriving the persons charged with the misdemeanor of the presumption of innocence.

See *Cooley's Constitutional Limitations*, 6th Ed., p. 375.

This presumption of innocence is held to be part of the constitutional guarantee to every person that he shall not be deprived of his life, liberty or property without due process of law, and as part of such constitutional guarantee, it has been upheld by this and other Courts. In the case of

Cummings v. *Missouri*, 4 Wallace, 277,

in which the Supreme Court of the United States declared certain clauses of the Constitution of the State of Missouri in conflict with the Constitution of the United States, Mr. Justice Field, writing the opinion, says:

"The clauses in question subvert the presumptions of innocence and alter the rules of evidence which heretofore, under the universal recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty."

See *Cummings* v. *Missouri*, 4 Wallace, at p. 328.

"Precisely how far the Legislature may go, in changing the modes and forms of judicial proceeding, I shall not attempt to define, but I have no hesitation in saying that they cannot subvert that fundamental rule of justice which holds that every man shall be presumed innocent until he is proved guilty. This rule will be found specifically incorporated into many of our State Constitutions, and is one of those rules which in our Constitution are compressed into the brief but significant phrase, 'due process of law.'"

Wynehamer v. *The People*, 13 N. Y., 378; Opinion of Selden, *J.*, at p. 446.

From these decisions it sufficiently appears that the penal provisions of the statute of Kansas, which is under consideration in this case, subvert the presumption of innocence, and are therefore unconstitutional and void as depriving the person who is tried, of his liberty without due process of law. The statute might, as far as the legal effect of it is concerned, as well have declared every person guilty of a misdemeanor punishable by fine and imprisonment who transports or drives into any county of the State of Kansas cattle coming from south of the southern boundary line of that State. Or, to express the same thing in another way, it prohibits common carriers of interstate traffic as well as all other persons, including citizens of the State of Kansas, from carrying or importing into that State any cattle coming from south of the southern boundary line of the State, by attaching a criminal liability to such carriage or importation. Another

step and the Court will perceive the far-reaching importance of this as bearing upon the case at bar.

The Kansas statute which is here in question must be read as a whole, and each part of it must be considered in the light of all its other parts. As we have shown, it prohibits the importation of cattle into Kansas from any place south of that State, and makes such importation punishable by fine and imprisonment. It goes further and gives to any person who claims to have been injured a right of action for damages, and applies to the trial of such action the same rule of evidence which, when applied to the criminal trial, deprives the person tried of his constitutional protection. And if that rule of evidence when applied in the criminal trial fails to give that "due process of law" to which every person is entitled before he can be deprived of his liberty, then the same rule of evidence applied to the trial of a civil action must be likewise held to fail to give the "due process of law" to which a person is equally entitled before he can be deprived of his property. That is a necessary inference from which there is no escape. In the trial of such a civil action, all cattle that come from south of the southern boundary line of Kansas are, under the statute, held to be *prima facie* liable to communicate Texas fever, and more than this, the owner or person in charge of such cattle is *prima facie* taken to have knowledge and notice thereof. If this—in the event of a verdict against the defendant in such civil action and of a judgment based thereon—does not deprive such defendant of his property without "due process of law," then it would be difficult to frame a confiscatory statute that would do so. Both the criminal and penal parts of the Kansas law are, therefore, equally unconstitutional and void, and the law as a whole cannot stand.

Now then, what is the effect of this law when considered with reference to the particular issues arising in the case at bar? Is it merely a regulation of a matter of "local interest only incidentally af-

fecting interstate commerce," such as a State may validly enact in the absence of Congressional action on the subject? Or is its effect to place such a burden upon interstate shipments of cattle as to make the statute an unwarranted interference with interstate commerce? We do not see any room for the slightest doubt that the statute belongs in the latter category. Its evident purpose, speaking plainly from the terms in which it is drawn, is to completely bar out from the State of Kansas for ten months of every year—and power to do so for ten months of the year would imply equal power to do so for the entire year—any cattle that come from south of the southern boundary line of that State. The Legislature might just as well have declared so in words; the purpose is there and that certainly is, in most instances, the practical effect.

If this be true, it will require no further argument to show that such a statute is an unwarranted attempt to interfere with interstate commerce, places a burden upon such commerce, and is, therefore, unconstitutional and void, and we need only refer this Court to the case of

Railroad Co. v. *Husen*, 95 U. S., 465,

which is decisive of this very point, and extracts from which will be found quoted at length in the brief already filed for the plaintiff in error.

Much latitude has been allowed the States in exercising their rather vaguely defined police power for the purpose of protecting the health and morals of their people and the safety of their property. But there is a point beyond which this latitude cannot go, and no State will be permitted, under the guise of exercising its police power, to infringe upon one of the great powers of Congress exclusively conferred upon that body by the Federal Constitution.

> "The Courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the in-

> quiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution.
>
> *Mugler* v. *Kansas*, 123 U. S., 623, at p. 661.

See also

Brimmer v. *Rebman*, 138 U. S., 78;
Minnesota v. *Barber*, 136 U. S., 313,

and the many other authorities cited in the brief already filed.

Scott v. Donald - 165 U.S. p. 58- 91-95-98.

A legitimate inspection law, passed by a State in the exercise of its police power, is one thing; attempted regulation of interstate commerce amounting to prohibition by one State under the guise of a quarantine law of the importation of an important commercial product of other States is quite another. The statute of Kansas which is here being passed upon is a plain attempt to interfere with interstate commerce. In fact, it goes as far in that direction as any statute that has ever come before this Court for its consideration. It is in conflict with the Federal Constitution and of no legal force or validity.

The Supreme Court of Kansas, in its opinion (Transcript of Record, pp. 292-293), has endeavored to argue that the case of *Railroad Co.* v. *Husen*, above cited, would justify the passage by a State of a statute like the Kansas statute in question, and the Court quotes from the opinion in that case the following extract:

> "It (a State) may exclude from its limits convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or in-

> fectious diseases; a right founded, as intimated in *The Passenger Cases*, 7 How., 283, by Mr. Justice Greer, in the sacred law of self-defense. *Vide* 3 Sawyer, 283. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases."
>
> See *Railroad Co.* v. *Husen*, 95 U. S., at p. 471.

But the Supreme Court of Kansas is entirely wrong in the conclusion which it draws, as is shown by the first sentence of the next paragraph of the opinion in the *Railroad Co.* v. *Husen case*, which is to the following effect:

> "*But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the National Government.*"
>
> See *Railroad Co.* v. *Husen*, 95 U. S., at p. 471.

While a State may exclude from its limits cattle "having," as the Court says, "contagious or infectious diseases," and therefore *proved to be dangerous*, it cannot do what Kansas has attempted, namely, to burden the importation of all cattle, whether proved to be dangerous or not, and thus to interfere with interstate commerce, "a subject confided exclusively to Congress by the Federal Constitution." Nor does the case of *Kimmish* v. *Ball*, cited by the Supreme Court of Kansas in its opinion (Transcript of Record, p. 293), strengthen that Court's argument in any way. It is not in point at all. In that case the State of Iowa had passed a statute providing that any person *having in his possession* "Texas cattle" should be liable for any damages accruing from allowing them to run at large, and thereby spread the disease known

as "Texas fever." That statute had nothing whatever to do with interstate commerce, and applied merely to property belonging to and in the possession of citizens of the State, and therefore *mingled with* the property properly under the jurisdiction of State laws. A previous section of the Iowa statute was directed against the importation of Texas cattle into the State of Iowa, except under certain restrictions, and the Supreme Court of the United States specifically distinguished between that section of the statute and the section making persons liable for damage accruing from allowing Texas cattle to run at large within the State, which latter section only was before the Court:

> "Section 4059, with which we are concerned, provides that any person who has in his possession in the State of Iowa any Texas cattle which have not been wintered north shall be liable for any damages that may accrue from allowing such cattle to run at large, and thereby spread the disease. We are unable to appreciate the force of the objection that such legislation is in conflict with the paramount authority of Congress to regulate interstate commerce. We do not see that it has anything to do with that commerce; it is only levelled against allowing diseased Texas cattle held within the State to run at large. The defendants labor under the impression that the validity of Sec. 4058, which is directed against the importation into the State of such cattle unless they have been wintered North, is before us, and that a consideration of its validity is necessary in passing upon Sec. 4059, but this is a mistake."
>
> See *Kimmish* v. *Ball*, 129 U. S., at pp. 220-221.

The Supreme Court of Kansas is wrong, both in its argument and in its conclusions. The cases which it cites do not aid or strengthen the reasoning by which it attempts to sustain the Kansas statute. That statute is, as we have shown, unconstitutional, both because it deprives a person of his liberty and

property without due process of law, and because it interferes with and attempts to regulate interstate commerce. With reference to the issues of this case, it must be declared void on the latter ground, and the plaintiff in error must be relieved of the damages in which it has been mulcted, because the statute under which those damages were recovered is an illegal interference with the interstate shipment of cattle, out of which this case arose.

III.

Even if the enactment by the State of Kansas of the statute in question were not inherently void as a regulation of interstate commerce—which it is—that statute cannot stand as against Federal legislation on the same subject with which the statute is inconsistent.

Congress has acted on the entire subject of interstate shipments of cattle, and all State laws inconsistent with the Federal laws and regulations are void.

We shall not take up any time in showing that the act of Congress of May 29, 1884, entitled "An Act for the establishment of a bureau of animal industry to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals," and the rules and regulations adopted by the Department of Agriculture in pursuance of the authority and directions given by said act, together provide a uniform plan or system governing all interstate shipments of cattle. That has been shown at length and so clearly by the brief filed for the plaintiff in error by Mr. Hagerman and Mr. Sedgwick, as to

obviate the necessity of saying anything upon the subject. Under this uniform plan or system of regulation formulated by Congress and the Federal Department of Agriculture, a section of the country is mapped out which is called or known as the infected area and from within which no cattle are to be shipped, except under stringent regulations for disinfection, which are prescribed. No restriction whatever—except against the shipment of cattle by any transportation agency with knowledge that such cattle are affected with a contagious or infectious disease*—is placed upon the shipment of cattle from outside of the infected area, so that such shipment from outside the infected area is left absolutely free and untramelled. Now then, if the Federal regulations on the subject of interstate cattle shipments do establish a uniform plan or system of regulation national in its scope, as they do, and if under such national system of regulation shipments from outside the infected area are left free and untrammelled, then it certainly follows that any State enactment which burdens or prohibits or in any way interferes with or assumes to regulate such interstate shipment from outside the infected area as declared by the paramount authority, is inconsistent and in conflict with the national system of regulation. That is exactly the situation with regard to the Kansas statute, which we are discussing. For that statute assumes to regulate and place a burden upon shipments of cattle from any point south of the southern boundary line of the State of Kansas whether such point be outside the infected area or not. The Supreme Court of the United States is therefore confronted with the question which of the two enactments in conflict with each other, that of the State of Kansas or that of the Federal Congress and Federal Department of Agriculture, is to be sustained. The mandate of the Constitution of the United States which

*We shall deal with that question in Point IV.

prescribes that such Constitution and all laws made in pursuance thereof shall be the supreme law of the land, furnishes, we think, the simplest answer to that question. No State statute can stand as against Federal legislation validly enacted, and the statute of Kansas under consideration in this case must therefore be declared invalid as being in conflict with the supreme law of the land.

The labored effort of the Supreme Court of Kansas in its opinion to prove that the Federal regulations and State statute are not in conflict is not, it seems to us, deserving of much consideration, because that Court failed altogether to point out the important points of difference between the two enactments. And of these the most important of all is the fact that the Federal law leaves the shipment of cattle from outside of the infected area established by it absolutely free and untrammelled, whereas the State law, if it is allowed to stand, subjects such shipments from outside of the infected area, if they come from south of the southern boundary line of Kansas, to the greatest possible burdens, amounting to prohibition. Again the Federal law creates absolutely no liability for violation of its provisions on the part of the carrier unless such carrier has been knowingly guilty, while the State law practically convicts it of violation and subjects it to civil and criminal liability before trial, by establishing a new rule of evidence of presumptive negligence, of notice and in fact of guilt, which it is difficult, if not impossible, to rebut.

The regulations of the Secretary of Agriculture, which are made under the authority and by the direction of the Act of Congress must be taken to have the same force and sanction as though they were contained directly in the Act of Congress itself. Now the regulations of that officer for the year 1892, in which this particular cattle shipment took place, after stating what constituted the infected area, prohibited the transportation (except for immediate slaughter) of any cattle from such area, between the

first day of *March* and the first day of December (see Transcript of Record, p. 27). The Kansas statute on the other hand burdens the importation into that State of all cattle, whether healthy or diseased, whether coming from outside of the infected area or not, between the first day of *February* and the first day of December (see Brief already filed for plaintiff in error, pp. 11 and 14). Certainly a very material variance between the two enactments.

In Section 6 of the Federal Act we find the following provision:

> "*Provided*, that the so-called splenic or Texas fever shall not be considered a contagious, infectious or communicable disease within the meaning of sections four, five, six and seven of this act as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto."
>
> See brief already filed for plaintiff in error, p. 4.

Under this provision it will be noticed that cattle actually affected with Texas fever might, on an interstate shipment, be brought into the State of Kansas, provided they were intended for slaughter. Under the Kansas statute, however, the fact that they were intended for slaughter would make no difference, and the bringing of such cattle into that State would make the person or carrier doing so guilty of a misdemeanor punishable by fine and imprisonment, and subject to an action for damages.

All these points of difference and many others the State Court entirely forgot to mention, and the conclusion at which it arrived under the very inadequate comparison of the two enactments which it made is, therefore, worthless:

> "It seems entirely clear to us that in the passage of this act Congress exercised its power to regulate commerce between the States in aid of the States in their efforts to prevent the spread of diseases among domestic

> animals and to assure purchasers of animals exported from this country for slaughter of their healthful condition. There is nothing whatever in the act prohibiting the States from enacting and enforcing regulations to extirpate and prevent the spread of contagious diseases, but, on the contrary, the States are in effect asked to be more active and vigilant in their efforts in that direction."
>
> See opinion of Kansas Supreme Court, Transcript of Record, p. 292.

This is in no way true. The act of Congress, as we have shown, was intended to provide a uniform and national system for the regulation of all interstate shipments of cattle. Certainly, this was a measure in aid of the States, but only in the way that all congressional legislation may be deemed to be in aid of the States and of their people. The Federal act asked no aid from any State. It did say that:

> "Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State of Territory in which pleuro-pneumonia or other contagious, infectious or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases, *and such plans and methods shall be accepted by the* Commissioner of Agriculture, and whenever the Governor of a State or other properly constituted authorities signify their readiness to co operate for the extinction of any contagious, infectious or communicable disease *in conformity with the provisions of* this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another."
>
> See brief already filed for plaintiff in error, p. 3.

There is nothing in the case to show that the Kansas statute was ever accepted by the Federal Department of Agriculture, and that statute is certainly not "in conformity with the provisions" of the act of Congress. On the contrary, it is directly inconsistent with that act, and it must therefore fall as all State statutes fall when they conflict with Federal legislation on any matter which, under the Constitution of the United States, is to be regulated by the Federal Government.

With less force still, could it be claimed that the statute of Kansas is in aid of the Federal enactment, if there be any such thing as State legislation to strengthen what is usually supposed to be the paramount power of the Federal Government. The act of Congress was passed in 1884. Kansas, on the other hand, had had laws on the subject of cattle transportation for many years before that. And it is noteworthy that all the laws of that State on this subject which were passed before 1884, the year of Federal legislation, seem to have been directed only against cattle actually diseased. Thus, in 1881, the Kansas Legislature passed a law providing:

> "That no person or persons shall drive or cause to be driven into or through any county in this State any cattle *diseased with a disease* known as Texas, Splenic or Spanish fever," * * * &c.
>
> See Kansas General Statutes of 1889, Vol. 2, p. 2057.

This statute said nothing whatever to the effect that all cattle from any place south of Kansas should be presumptively diseased, and that persons bringing any cattle into Kansas from south of that State should be fined and imprisoned and mulcted in damages. The only reference in it to the matter of evidence is that cattle of "wild and undomesticated habits" might be taken as *prima facie* diseased, a regulation which, as based upon study and facts

with regard to cattle diseases, it was entirely competent for the Legislature to make.

See Kansas General Statutes of 1889, Vol. 2, page 2059.

Such a law, aimed exclusively at cattle actually diseased, is concededly within the police power of a State, and valid, and if Kansas had only kept within the reasonable limits of the Statute of 1881, the Supreme Court of the United States would never have been burdened with the consideration of this case. But it would seem that no sooner had Congress passed the Act of '84, than Kansas, instead of retaining a law whi was validly enacted and under which the domes cattle of the State would be amply protected against disease, started in to pass laws of the most drastic character inconsistent and conflicting with the Federal statute and framed as if to emphasize the indifference of the Kansas authorities to the regulations of the National Government. The objects aimed at by the act of Congress of May 9, 1884, namely, the creation of a uniform system for the regulation of interstate shipments of cattle all over the United States, might have been helped by the Kansas statute of 1881, a legitimate quarantine law directed against cattle actually diseased, whereas they are defeated by a statute which, like the one we are considering, places an intolerable burden on interstate commerce in healthy cattle coming from sections of the country which, after an investigation by the Federal authorities, have been found to be free from disease, and trade from which should, as a matter of public policy, therefore not be restricted. To say that the Kansas statute, after what we have shown to be its plain purpose and necessary effect, is a statute in aid of Federal legislation, would be absurd.

But there is yet more evidence of the inconsistency of the Kansas statute with the objects of the Federal

act. The plaintiff in error is a common carrier, and as such carrier was under an obligation to accept in Texas the cattle of Hosier Brothers for transportation and delivery. Had it refused to do so it would have been liable to an action for damages by the intending shippers in the State of Texas, the authorities of which State have never been backward in awarding damages against railroad corporations or in compelling them to perform every act which is technically part of the duty of a common carrier. In such action the Kansas statute would have afforded the plaintiff-in-error no defense, yet when the cattle arrive at the border of Kansas, it is punished under the statute for bringing them there. Liable in damages in Texas for not accepting the cattle for carriage into Kansas; liable in damages in Kansas for accepting and carrying them. Is this just, or can it possibly be sanctioned by the Supreme Court of the United States? We think not. For it is exactly this result of the Kansas statute which shows the conflict between that statute and the enactments of the Federal Government. It is exactly this result—which must inevitably follow from inconsistent and heterogeneous legislation by the different States—that Congress intended to abolish by creating one uniform consistent system of regulation, embracing all the states and protecting all alike without unjustly burdening any of them. The Statute of Kansas is directly subversive of the system so created, and it must consequently be declared invalid, unless the State of Kansas is conceded to have a degree of sovereign power greater than that of any other State in the Union, and amounting practically to independence of the Federal Constitution and of Federal laws.

IV.

The action in the State Court was based solely upon the State statute. But even if it had not been, and if the action had been brought under the Federal statute, or at common law, there is nothing in the case which would make the plaintiff in error liable.

That the action of the plaintiff in the State court was based upon the State statute is shown by the opinion of the Supreme Court of Kansas, which says:

> "The first question to consider is whether there is really any conflict between the act of Congress *and the State statute, on which the plaintiff's cause of action is based.*"
>
> See Transcript of Record, p. 289.

An inspection of the amended petition in the Court below shows this conclusively.

See Transcript of Record, p. 8.

But let us suppose that the action had not been so brought, and that under his amended petition the plaintiff in the Court below was at liberty to proceed either under the Federal statute or at common law. He certainly would not have been able to recover. In the first place, the Federal statute does not provide for any civil action for damages. Secondly, and what is more important, no carrier or railroad company can be subjected to the liability created by the Federal statute (namely, punishment of the officials or agents of such carrier or railroad company for a misdemeanor), unless it is shown that such carrier or railroad company has "*knowingly*" violated the provisions of the act. We quote here the sections of the Federal statute that are relevant:

> "Sec. 6. That no railroad company within the United States, or the owners or masters

of any steam or sailing or other vessel or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia. * * *

Sec. 7. That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat or other transportation company doing business in or through any infected locality, and by publication in such newspapers as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall *knowingly* violate the provisions of section six of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."

See pages 4 and 5 of brief already filed for plaintiff in error.

The same thing is true at common law. That a railroad company must have knowledge of the dangerous character of property carried by it before it can be liable for any damage caused by such dangerous property is elementary. Now, the plaintiff in error in this case had no such knowledge; it did not have the slightest ground for suspicion that the cattle which it shipped were dangerous. On the contrary, it had every reason to believe that they were in a sound and healthy condition. Those cattle came from outside the infected area established by the regulations of the Federal Government, and permits for their shipment into Kansas had been duly procured from the proper

officials. To require anything more of a railroad company doing a vast interstate traffic business would be as unreasonable as it would be impracticable. But if any further evidence were needed to show that the plaintiff in error had no actual knowledge or notice of the alleged unhealthy condition of the cattle carried by it, it is given by the answers of the jury in the State trial court to some of the special questions propounded to such jury on behalf of the defendant company:

> "1. Did the railroad company have any actual notice that these cattle or any of them were from the infected district of Texas?
>
> Answer. No.
>
> 8. Did not Hosier Brothers send two men with each train of cattle, and was it not the duty of such men to look after and care for the cattle?
>
> Answer. Yes.
>
> 9. Did the trainmen or employees of the defendant in charge of the train have anything to do with the handling of the cattle or with the loading or unloading of them?
>
> Answer. No.
>
> 10. Was it not the duty of the trainmen in charge of the train in which the Hosier Brothers' cattle were shipped to simply look after the management and operation of the train?
>
> Answer. Yes.
>
> 11. Is it not a fact that all the information given to the railroad company by Hosier Brothers and by Francis Brogan was to the effect that said cattle were from Pecos County, Texas?
>
> Answer. Yes.
>
> 12. Is it not a fact that by the rules and regulations of the Honorable Jeremiah M. Rusk, Secretary of the Department of Agriculture, establishing a quarantine line, Pecos County, Texas, was entirely west and outside of said line?
>
> Answer. Yes; we suppose so.
>
> 14. Is it not a fact that Texas fever can be communicated to native cattle by other means than the Texas cattle tick?
>
> Answer. Yes.

15. Is it not a fact that cattle from north and west of the Government quarantine line are not supposed by the Bureau of Animal Industry to be inoculated with germs of Texas fever and are supposed to be incapable of communicating it to native cattle?

Answer. Yes; that's the supposition.

21. It it not a fact that the Bureau of Animal Industry kept an inspector at Fort Worth, Texas, and one at Parsons, Kansas, whose duty it was to inspect all cattle shipped north over the lines of the railroad company through those places and to stop all cattle coming from inside of the quarantine line or infected area?

Answer. Yes.

22. Is it not a fact that said inspectors determined by the brands of cattle whether they are from north and west of the Government quarantine line?

Answer. Yes.

23. Is it not a fact that these cattle were branded with Hosier Brothers' brand?

Answer. The most of them.

25. Did not such brands indicate that said cattle were from west of the Government quarantine line?

Answer. Yes.

26. Is it not a fact that the railroad company delivered the cattle to Hosier Brothers at Hartford, and until such delivery no Texas fever was communicated by them and no damage done to the plaintiff or any of the claimants suing under their cross-petitions?

Answer. Yes.

27. If you find that the cattle communicated Texas fever, is it not a fact that such fever was communicated by the drive across the country from Hartford to the Brogan pasture, in Chase County, and the placing of the cattle in such pasture?

Answer. Yes.

28. Who were the owners of these cattle at the time they were driven from Hartford to the Brogan pasture?

Answer. Hosier Bros.

29. Is it not a fact that Hosier Brothers, the owners of the cattle, by their agents, the

Brogans, drove the cattle from Hartford to the Brogan pasture?

Answer Yes; it is alleged so."

See Transcript of Record, pp. 272–274.

These answers show that the plaintiff in error had no knowledge or notice that the cattle were dangerous, but that, on the contrary, as the plaintiff in error knew, they came from outside of the infected district which was supposed to make them incapable of communicating the Texas fever disease. More than this, they show that no damage whatever was caused by the cattle while in the possession of the railway company, and that if any damage was caused by such cattle, it happened altogether after they had passed out of the plaintiff in error's possession and control. The essential element necessary to fix upon plaintiff in error any liability under the Federal statute or at common law—namely, knowledge that the cattle were dangerous or infected with disease—is therefore entirely absent in this case, and the judgment recovered in the State court was erroneous, whether the action was brought under the State statute or not, since that judgment could never have been recovered had not plaintiff in error been subjected to the presumption of guilt and knowledge which that statute created.

It is true that the Supreme Court of Kansas in its opinion says that "even if this were an action at common law for negligently spreading the disease * * * a very strong case is made by the testimony against the company" (Transcript of Record, p. 295), and that counsel for plaintiff in error try to make much of this statement in their brief. But we would point out that the answers of the jury to the special questions above quoted are conclusive upon the facts of the case, and that those answers show that the statement of the Kansas Court is incorrect. The ticks which, as the Supreme Court of Kansas says, "are regarded as a strong, if not absolutely certain, indication that the cattle are

capable of communicating the disease," and which it claims "were plainly and easily discernible on many of the cattle," are as a matter of fact not necessarily indicative of the dangerous condition of the cattle at all. The testimony shows that there is no difference in size and appearance between the ordinary wood tick, which is often found on cattle and is entirely harmless, and the Texas fever cattle tick, and that it would take an expert to be able to distinguish the difference.

Transcript of Record, p. 157.

Certainly there is no rule of law that requires a carrier to be an expert in cattle ticks and cattle diseases. Nor can we concur with the Supreme Court of Kansas in the statement that there is "no inconsistency between the special findings and the general verdict of the jury." The jury's special findings are absolutely inconsistent with the verdict and judgment against the plaintiff in error. While the instructions of the trial Court to the jury may have been proper enough from the standpoint of a Kansas Judge required to enforce a Kansas statute, they certainly fell far short of being just or what the Supreme Court of Kansas calls "eminently fair." The trial Court did instruct the jury that:

> "12. It is not necessary in order to enable the plaintiff and cross-petitioners to recover from the defendant railway company that said company, its agents or employees, should have actual knowledge that these cattle which it transported to Hartford were dangerous or liable to communicate to native cattle the Texas fever. It is sufficient to make defendant company liable if such agents and employees had reason to know that such cattle were dangerous and could have known it by the exercise of ordinary care and diligence."
>
> Transcript of Record, p. 269.

But it also instructed the jury that:

> "5. The statute of this State makes the fact of bringing any cattle from south of the south line of Kansas, between the first day of

February and the first day of December, *prima facie* evidence that such cattle were capable of communicatiug and liable to impart Texas, splenic or Spanish fever, and that the person in charge of such cattle had full knowledge and notice of their ability to impart such disease to the native cattle."

Transcript of Record, p. 268.

So that we see that in the view of the Kansas Court, which was also, of course, impressed upon the jury, the mere fact that the cattle came from south of the southern boundary line of the State of Kansas was sufficient to impute knowledge of their dangerous condition to the railway company. It is impossible to come to any other conclusion than that such knowledge was not shown, and was only inferentially imputed to the plaintiff in error through the operation of the unjust rule of evidence created by the Kansas law. And with such proof of knowledge on the part of plaintiff in error wanting, the judgment of the State court cannot be supported either from the standpoint of the common law or of the Federal statute.

Gulf, Col. & S. F. R. R. vs. Ellis, 165 U. S. 150.

V.

But little need be added. It has been shown that this Court unquestionably has jurisdiction. It has been shown that the statute enacted by the State of Kansas which we have been considering was inherently in conflict with the Constitution of the United States, and therefore void, as being an unwarranted interference with interstate commerce. It has been shown also that even if such statute had not been in itself—as an unwarranted interference with and burden on interstate commerce—beyond the power of the State to enact, it is certainly void as being inconsistent with the Federal system for the regulation of interstate cattle shipments created by the Act of Congress of May 9, 1884, and the national quaran-

tine rules framed by the Department of Agriculture in pursuance thereof. It has been shown further that no liability could attach to the plaintiff in error, either under the Federal enactments, or at common law, on account of the carriage by it of the cattle whose alleged diseased condition gave rise to this case. The important Federal question involved having therefore been incorrectly decided by the State court, and there being no other ground on which the judgment of that court can be supported, Federal or non-Federal, such judgment must in the interests of justice be reversed by this Court in the exercise of the jurisdiction conferred upon it by the Judiciary Act. The insinuation of counsel for defendants in error in their brief that the writ of error in this case was sued out merely for delay is, to say the least, totally unjustified. Railroad companies, as well as other persons, are entitled to the most careful and scrupulous adjudication of their rights, and while the defendants in error may have suffered harm and damages as their counsel claim, they are certainly not entitled to have those damages paid by one whose course has been throughout wholly innocent and blameless. It is of the highest importance that the law on this subject should be finally settled, and that the plaintiff in error and all other railroad companies should know what their duties are and whether they are to obey what has always been thought the paramount authority of the Federal Government, or the particular statutes and often conflicting enactments of the various States. We submit that the supremacy of Federal legislation on matters pertaining to interstate commerce should be asserted by this Court, and that the judgment of the Supreme Court of Kansas should therefore be reversed and the case remanded to that court, with instructions to dismiss the amended petition and cross petitions and to take no further proceedings.

SIMON STERNE,
Of Counsel for Plaintiff in Error.